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No. 10430

United States

Circuit Court of Appeals

For the Ninth Circuit.

WONG CHIN PUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

FILED
AUG 18 1943
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10430

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

JOHN P. HANNON,

1110 Yeon Building, Portland, Oregon, and

LEON W. BEHRMAN,

604 Oregonian Building, Portland, Oregon,
For Appellant.

CARL C. DONAUGH,

United States Attorney for the District of Oregon, and

WILLIAM H. HEDLUND,

Assistant United States Attorney for the District of Oregon, United States Court House, Portland, Oregon,
For Appellee.

In the District Court of the United States for the District of Oregon

November Term, 1942.

Be It Remembered, That on the 27th day of February, 1943, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment in words and figures as follows, to wit: [1*]

In the District Court of the United States for the District of Oregon
16273

UNITED STATES OF AMERICA

vs.

WONG SUEY, NEE TOY, WONG CHIN PUNG, JAMES WONG, and LOUIS JUNG, alias GAR FOO,

Defendants.

United States of America,
District of Oregon—ss.

INDICTMENT FOR VIOLATION OF SECTION 2553, TITLE 26, AND SECTION 174, TITLE 21, U.S.C.A.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege and present:

***Page numbering appearing at foot of page of original certified Transcript of Record.**

Count One:

That Wong Suey, Nee Toy, Wong Chin Pung, James Wong, and Louie Jung, alias Gar Foo, then and there being and acting together, on to-wit: the 12th day of January, 1943, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did unlawfully, knowingly, wilfully and feloniously purchase, sell and distribute a quantity of a certain compound, manufacture, salt, derivative and preparation of opium, to-wit: a quantity of smoking opium, which said smoking opium aforesaid was not then and there in the original stamped package, nor from the original stamped package, containing said smoking opium, and did not then and there bear and have affixed thereto appropriate tax paid stamps as required by the Act of Congress approved December 17, 1914, as amended, commonly known as the Harrison Narcotic Law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present: [2]

Count Two:

That Wong Suey, Nee Toy, Wong Chin Pung, James Wong, and Louis Jung, alias Gar Foo, the defendants above-named, then and there being and acting together, on to-wit: the 12th day of January, 1943, at Portland, in the State and District

of Oregon, and within the jurisdiction of this Court, did unlawfully, feloniously, knowingly and fraudulently receive, transport, conceal and sell, and assist in receiving, concealing, transporting and selling a quantity of narcotic drug, to-wit: smoking opium, which had theretofore been unlawfully and feloniously brought into the United States, said defendants then and there well knowing the said narcotic drug so received, concealed, transported and sold by them to have been unlawfully and feloniously imported and brought into the United States contrary to law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 27th day of February, 1943.

A True Bill

A. C. McMICKEN,
Foreman, United States
Grand Jury.

CARL C. DONAUGH,
United States Attorney.

WILLIAM H. HEDLUND,
Assistant United States Attorney.

[Endorsed]: Filed: February 27, 1943. [3]

And Afterwards, to wit, on Tuesday, the 30th day of March, 1943, the same being the 26th Judicial

day of the Regular March, 1943, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [4]

PLEA OF NOT GUILTY

No. C-16273

[Title of Cause.]

INDICTMENT:

Section 2253, Title 26 and Section 174, Title 21, United States Code.

Now at this day come the plaintiff by Mr. William H. Hedlund, Assistant United States Attorney, the defendants Wong Suey, James Wong and Wong Chin Pung, each in his own proper person and by Mr. John P. Hannon, of counsel, and the defendants Nee Toy and Louis Jung alias Gar Foo, by Mr. John Collier, of counsel. Whereupon said defendants are duly arraigned upon the indictment herein and each of the defendants for himself says that he is not guilty. Whereupon, the parties hereto stipulate and agree in open court that this cause may be tried before the Court without the intervention of a jury, and

It Is Ordered that this cause be, and the same is hereby, set for trial for Friday, April 16, 1943, and that the bond heretofore given by each of said defendants, be continued to the further order of the Court. [5]

And Afterwards, to wit, on the 16th day of April, 1943, there was duly Filed in said Court, a Stipulation waiving trial by jury, in words and figures as follows, to wit: [6]

[Title of District Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY

It Is Hereby Stipulated between the parties that the within cause may be tried before the Honorable Claude McColloch, United States District Judge, without the intervention of a jury, and the defendants hereby expressly waive the right to a jury trial.

WILLIAM H. HEDLUND,
Of Attorneys for United States of America.

JOHN A. COLLIER.
Attorney for Defendants, Nee Toy and Louis Jung, alias Gar Foo.

J. P. HANNON,
Attorney for Defendants, Wong Suey, Wong Chin Pung, and James Wong.

WONG CHIN PUNG,
WONG SUEY,
JIMMY WONG,
NEE TOY,
LOUIE GAR FOO,
Defendants.

[Endorsed]: Filed April 16, 1943. [7]

And Afterwards, to wit, on the 26th day of April, 1943, there was duly Filed in said Court, Findings by the Court, in words and figures as follows, to wit: [8]

[Title of Court and Cause.]

FINDINGS OF THE COURT

On this 26th day of April, 1943, the above-entitled cause came on for findings and judgment as to the defendants, Wong Suey, Nee Toy, Wong Chin Pung, and James Wong, the Court having tried this cause without the intervention of a jury, a jury having been waived by stipulation of the parties hereto, the United States of America having appeared by William H. Hedlund, Assistant United States Attorney for the District of Oregon, the defendants, Wong Suey, Wong Chin Pung, and James Wong, having appeared in person and by John P. Hannon, their attorney, and the defendant, Nee Toy, having appeared in person and by his attorney, John Collier, and the Court having heretofore heard all of the issues of law and fact herein and having fully considered all said issues of law and fact, the Court does now find the defendant, Wong Suey,

Not Guilty as charged in Count One of the Indictment herein; and

Guilty of assisting in concealment as charged in Count Two of the Indictment herein; and the defendant, Nee Toy,

Guilty of purchase as charged in Count One of the Indictment herein, and

Guilty of assisting in concealment as charged in Count Two of the Indictment herein; and the defendant, Wong Chin Pung,

Not guilty as charged in Count One of the Indictment here, and

Guilty of assisting in concealment as charged in Count Two of the Indictment herein; and the defendant, James Wong, [9]

Not Guilty as charged in Count One of the Indictment herein; and Guilty of assisting in concealment as charged in Count Two of the Indictment herein.

Dated at Portland, Oregon, this 26th day of April, 1943.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed April 26, 1943. [10]

And Afterwards, to wit, on Tuesday, the 4th day of May, 1943, the same being the 56th Judicial day of the Regular March, 1943, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [11]

In the District Court of the United States for the District of Oregon

No. C-16273

May 4, 1943.

UNITED STATES OF AMERICA

vs.

WONG SUEY, NEE TOY, WONG CHIN PUNG, JAMES WONG, and LOUIS JUNG alias GAR FOO.

INDICTMENT:

Section 2553, Title 26, and Section 174, Title 21, United States Code.

SENTENCE OF THE COURT

Now at this day comes the plaintiff by Mr. William H. Hedlund, Assistant United States Attorney, and the defendant Wong Chin Pung in his own proper person and by Mr. John P. Hannon, of counsel. Whereupon, it appearing to the Court that the said defendant has been heretofore found guilty on Count Two of the indictment by a finding of the Court, and this being the day set for the passing of sentence upon said defendant,

It Is Adjudged by the Court that the said defendant Wong Chin Pung, is guilty of the offense of unlawfully, feloniously, knowingly and fraudu-

lently assisting in the concealment of a quantity of smoking opium which had heretofore been unlawfully brought into the United States, as charged in Count Two of the indictment herein; and said defendant waiving time for passing sentence is asked if he has anything to say why sentence should not now be pronounced against him, and no sufficient cause being shown,

It Is Further Adjudged that the said defendant Wong Chin Pung do pay a fine of One Thousand Dollars and be imprisoned for a term of Three Years and from and after the expiration of said term until said fine be paid, for the offense charged in Count Two of the indictment; that said defendant be committed to the custody of the Attorney General of the United States or his authorized representative, who will designate the place of confinement of said defendant, and that said defendant stand committed until this sentence be performed or until he be otherwise discharged according to law.

Dated at Portland, Oregon, this 4th day of May, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed: May 14, 1943. [12]

And Afterwards, to wit, on the 8th day of May, 1943, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is Wong Chin Pung, Portland, Oregon.

The name and address of appellant's Attorney is John P. Hannon, 1110 Yeon Building, Portland, Oregon.

The offense of which defendant was convicted is that on or about the 12th day of January, 1943, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, did unlawfully, feloniously, knowingly and fraudulently receive, transport, conceal and sell, and assist in receiving, concealing, transporting and selling a quantity of narcotic drug, to-wit: smoking opium, which had theretofore been unlawfully and feloniously brought into the United States, said defendant then and there well knowing the said narcotic drug so received, concealed, transported and sold by him to have been unlawfully and feloniously imported and brought into the United States contrary to law; contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

The date of judgment of conviction is May 4, 1943.

A brief description of the judgment or sentence imposed on defendant, Wong Chin Pung, from which he appeals, is to the effect that defendant

be imprisoned for three years in place as the Attorney-General may designate, and pay a fine of $1000.00 and stand committed until such fine is paid.

The name of the prison where defendant is now confined is Multnomah County jail, Portland, Multnomah County, Oregon. The place of imprisonment under said sentence having not been designated by the Attorney-General. [14]

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the judgment above mentioned, on the grounds set forth below.

Dated this 4th day of May, 1943.

WONG CHIN PUNG,
Appellant.

The grounds of this appeal are:

First: That the Court erred in finding and holding that the defendant was guilty of the crime charged in said indictment for the reason that there were no facts or evidence to support or justify the judgment or sentence of the Court.

Second: That the Court erred in imposing against the defendant the sentence herein described, or any sentence.

Third: That the Court erred in not returning a judgment of acquittal in favor of said defendant.

Due service accepted this 8th day of May, 1943.

WILLIAM H. HEDLUND,
Ass't. United States District Attorney.

[Endorsed]: Filed: May 8, 1943. [15]

And Afterwards, to wit, on Thursday, the 3rd day of June, 1943, the same being the 82nd Judicial day of the Regular March, 1943, Term of said Court; present the Honorable, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [16]

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH TO SETTLE AND FILE BILL OF EXCEPTIONS AND ASSIGNMENT OF ERRORS

This matter coming on for hearing on Motion of the defendant and appellant, Wong Chin Pung, by and through his Attorney, John P. Hannon, for an Order extending said defendant and appellant's time in which to settle and file Bill of Exceptions and Assignment of Errors in the above entitled cause, to and including the 21st day of June, 1943, and it appearing to the Court that it is in the interest of justice that said extension be allowed:

It Is Therefore, Ordered, that said defendant and appellant, Wong Chin Pung, have to and including the 21st day of June, 1943, in which to settle

and file in the above entitled cause, his Bill of Exceptions and Assignment of Errors therein.

Dated this 3rd day of June, 1943.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed: June 3, 1943. [17]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages from 1 to 21 inclusive, contain a transcript of the matters of record in said court pertinent to the appeal from a judgment and sentence in a certain criminal cause then pending in said court numbered C-16273, in which the United States of America is plaintiff and appellee, and Wong Suey, Nee Toy, Wong Chin Pung, James Wong and Louis Jung, alias Gar Foo are defendants, and the said Wong Chin Pung is appellant, as designated by the stipulation for transcript in said cause by said appellant; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause as designated by the said stipulation, as the same appears of record at my office and in my custody.

I further certify that the cost of the foregoing transcript is $5.00 for filing Notice of Appeal, and $6.50 for preparing and certifying the within transcript, making a total of $11.50 and that the same has been paid by the said appellant.

I further certify that there is transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, with the foregoing transcript, the original bill of exceptions and the original assignment of errors filed in said cause by said appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 14th day of June, 1943.

[Seal] G. H. MARSH,
Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant, Wong Chin Pung, and files the following Assignment of Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth District:

I.

That the Court erred in finding and holding that the defendant, Wong Chin Pung, was guilty under count two of the indictment, for the reason that there were no facts or evidence to support or justify the judgment.

II.

That the Court erred in imposing against the defendant, Wong Chin Pung, any sentence.

III.

That the Court erred in not returning a judgment of acquittal in favor of the defendant, Wong Chin Pung.

LEON W. BEHRMAN
JOHN P. HANNON
Attorneys for Appellant,
Wong Chin Pung.

Due service accepted this 10th day of June, 1943.

WILLIAM H. HEDLUND
Attorney for United States of America

[Endorsed]: Filed June 11, 1943.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that the above entitled case came on regularly for trial on Friday, April 16th, 1943, in the above entitled Court at Portland, Oregon, before the Honorable Claude McColloch, Judge presiding, a Jury having been waived in writing as by law provided. The United States of America appeared by Messrs. Carl C. Donaugh, United States Attorney, and William H. Hedlund,

Assistant United States Attorney. Defendant appeared in person and by his attorney, John P. Hannon. The Court at the conclusion of the case took it under advisement as to the appealing defendant, Wong Chin Pung.

The appealing defendant respectfully submits the following Bill of Exceptions:

Exception No. I

At the conclusion of the evidence the appealing defendant moved the Court for a judgment of dismissal on the grounds that the Government had failed and neglected to submit evidence sustaining the charges and counts made in the indictment. Thereafter, on the 4th day of May, 1943, the Court found this appealing defendant guilty on Count two of assisting in concealment of smoking opium, to which finding the defendant excepted.

In connection herewith there is hereto attached a full transcript of the testimony introduced in this cause, certified by Cloyd D. Rauch, Reporter, and made a part of this Bill of Exceptions.

JOHN P HANNON
LEON W. BEHRMAN
Attorneys for Appellant,
Wong Chin Pung.

State of Oregon
County of Multnomah—ss.

It is hereby certified that on the 3rd day of June, 1943, the Honorable Claude McColloch, Judge of the above entitled Court, for good cause shown entered an Order allowing defendant, Wong Chin

Pung, to have to and including the 21st day of June, 1943, for settlement and filing of Bill of Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony offered in the above entitled case and made a part of this Bill of Exceptions.

It is further certified that the foregoing Exceptions asked and taken by the defendant, Wong Chin Pung, were duly presented within the time fixed by law and the Order of this Court, and the Bill of Exceptions is by me duly allowed and signed this 11th day of June, 1943.

CLAUDE McCOLLOCH

Judge of the District Court of the United States, for the District of Oregon.

State of Oregon
County of Multnomah—ss.

Due service of the within Bill of Exceptions is hereby accepted in Multnomah County, Oregon, this 11th day of June, 1943, by receiving a copy thereof, duly certified to as such by Leon W. Behrman and John P. Hannon, Attorneys for defendant and appellant, Wong Chin Pung.

WILLIAM H. HEDLUND
Asst. Attorney for United States of America.

[Title of District Court and Cause.]

Portland, Oregon, Friday, April 16, 1943.
10:30 A.M.

Before: Hon. Claude McColloch, Judge, without a jury.

Appearances:

Messrs. William B. Hedlund and William Langley, Assistant United States Attorneys, appearing for the United States of America; Mr. John A. Collier, Attorney for defendants Nee Toy and Louis Jung alias Gar Foo; Mr. John P. Hannon, Attorney for defendants Wong Suey, Wong Chin Pung and James Wong.

Cloyd D. Rauch, Court Reporter.

PROCEEDINGS

(Various objects and documents were marked for identification as Government's Exhibits 1 to 7, both inclusive.) [1*]

The Court: All right, go on.

Mr. Hedlund: Your Honor, we were trying to mark the exhibits, but I think we can do that as we go along.

First of all, I think we had better have the defendants up here to sign the stipulation.

Mr. Collier: Yes.

Mr. Hedlund: Your Honor, may I have Mr. Bangs sit beside me to assist me to keep track of these exhibits?

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* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Yes.

Mr. Hedlund: In the meantime, your Honor, we find a clerical error on one of the indictments that was returned yesterday.

The Court: Wait until they sign that.

Mr. Hedlund: It has nothing to do with this particular case.

The Court: I know, but one thing at a time.

Mr. Hedlund: We now present the stipulation waiving the jury .

Call Mr. Ringstrom.

The Court: Are you ready?

Mr. Hannon: Ready, your Honor.

The Court: Mr. Collier?

Mr. Collier: Ready, your Honor.

The Court: Wasn't there another lawyer for the defense in this case?

Mr. Hannon: No, your Honor.

The Court: This is not the case that Behrman is in?

Mr. Hannon: No; that is the Lee case. [2]

The Court: Will you identify the defendants to me, and have them sit in the same places during the trial, please.

Mr. Collier: This is Louis Gar Foo, and this is Nee Toy.

The Court: Yes.

Mr. Hannon: Jimmie Wong.

The Court: Yes.

Mr. Hannon: And Wong Chin Pung.

The Court: What is the last name?

Mr. Hannon: Pung. And this is Wong Suey.

The Court: Whom do you represent?

Mr. Collier: I represent these two, Louis Gar Foo and——

The Court: (Interrupting) And you represent the other three?

Mr. Hannon: The other three, your Honor.

Mr. Hedlund: Gar Foo is sometimes referred to as Louis Jung. [3]

HUGO RINGSTROM

was thereupon produced as a witness in behalf of the United States of America and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hedlund:

Q. Now, Mr. Ringstrom, by whom are you employed?

A. Alcohol Tax Unit, U. S. Treasury Department.

Q. In what capacity? A. As chemist.

Q. And how long have you been so employed?

A. Since the unit was formed, but in similar work for twenty years.

Q. Prior to that time where were you educated?

Mr. Hannon: We admit his qualifications, your Honor.

Mr. Hedlund: Thank you. Will you admit his qualifications as to his knowledge of smoking opium?

Mr. Hannon: Yes.

Mr. Hedlund: Very well.

(Testimony of Hugo Ringstrom.)

Q. Now, Mr. Ringstrom, in the cases of Wong Suey, Nee Toy, Wong Chin Pung, James Wong, and Louis Jung, do you have some exhibits which purport to be connected with that case?

A. Yes, sir.

Q. Now, first of all, do you have two white porcelain jars? A. Yes.

Q. And seven packages containing forty-eight bindles of smoking [4] opium. Is that one exhibit? How is that arranged? I have my notation as Exhibit 2. Tell us as you go along what you find, Mr. Ringstrom.

A. This is an ointment jar containing smoking opium.

Q. Do you know how much is in it?

A. One of them contained approximately one hundred ninety-five grains and the second one approximately one hundred eighty-five grains.

Q. You have two of those jars there?

A. Yes, sir.

Q. All right. Now, what else have you got in those exhibits? We will get them marked for identification as soon as we get it straightened out here.

A. There are about forty-eight bindles of smoking opium.

Q. Well, how is that wrapped?

A. In Chinese lottery tickets.

Q. Mr. Hedlund: Well, now, let's see,—let's have that exhibit marked for identification, please, including the jars.

(Testimony of Hugo Ringstrom.)

(The objects referred to, so produced, were thereupon marked for identification as Government's Exhibit 8.)

Mr. Hannon: Mr. Bailiff, will you hand that over here for examination. Hand it to the witness, please.

Q. Now, Mr. Ringstrom, will you examine the contents and describe what is in there? I think you will find, if I might help you [5] so as to keep the record straight, two jars, and then also eight packages containing numerous bindles. Now, will you explain to the Court what they are?

A. These two ointment jars contained smoking opium.

Q. All right. Describe that to the Court. What is that package?

A. It is a package containing bindles of smoking opium.

Q. How many bindles? A. Ten.

Q. One package containing ten bindles. All right, go on. What is the next package there that you find? Well, now, Mr. Ringstrom, to save time, you have examined all those packages, have you not?

A. Yes, sir.

Q. And what do they contain?

A. Smoking opium.

Q. And how many packages are there?

A. Well, I don't remember. I will have to count them.

(Testimony of Hugo Ringstrom.)

Q. Well, just count the packages. Not the number of bindles in each package.

A. There are eight.

Q. Eight packages, each containing smoking opium? A. Yes, sir.

Q. You have tested them, have you?

A. Yes, sir.

Q. And that is what your conclusion was? [6]

A. Yes, sir.

Mr. Hedlund: Now, you have another exhibit. I think it might be notes as number 3. You had better put those jars back into that, so as to keep them straight, then the bailiff can take that over to the Clerk's desk or some place else. Now, will you please have that marked for identification.

(The object referred to, so produced, was thereupon marked for identification as Government's Exhibit 9.)

Mr. Hedlund: Hand that to the witness, please.

Q. Tell us what is in that exhibit?

A. It is bindles containing yenshee.

Q. How much?

A. I have the weight of the individual packages, but I haven't added it up.

Q. Well, didn't you add it up previously, once upon a time, so many grains of yenshee?

A. Only per exhibit, or per package. I haven't added them up.

Q. Well, approximately how many are there there?

(Testimony of Hugo Ringstrom.)

A. About one hundred and twenty-three grains.

Q. Very well. Now, will you tell what yenshee is?

A. It is the residue from smoking opium.

Q. And do you know whether that is ever re-used? A. Yes, sir, I do.

Q. And is it or is it not re-used? [7]

A. Yes, it is re-worked.

Q. And it still has the effect of opiate left in it?

A. It still has some opium in it that can be recovered.

Q. Now, will you take the exhibit that you have as 3, marked as 3—or 4, I beg your pardon.

(An object was thereupon produced and marked for identification as Government's Exhibit 10.)

Mr. Hedlund: Hand that to the witness, please. And, Mr. Bailiff, would you take that Exhibit 9 and put it over on the Clerk's desk, so that it is out of the way.

Q. Will you describe what that Government's Exhibit 10 contains?

A. There are eight packages here wrapped in Chinese lottery tickets which each contain ten bindles of smoking opium.

Q. Can you estimate approximately how many grains that would be? A. Yes, sir.

Q. How many?

A. There's approximately six hundred grains.

Q. Now, Mr. Ringstrom, where did you get these exhibits? Where did you receive these exhibits?

(Testimony of Hugo Ringstrom.)

A. In room 210 Federal Office Building, Seattle, Washington.

Q. From whom?

A. From Narcotic Agent Donald Smith.

Q. When? A. On January 18th, 1943. [8]

Q. Have they been in your possession continuously and exclusively ever since? A. Yes, sir.

Q. And are they in the same, or substantially the same, condition as they were at the time that you received them?

A. They are, with the exception of a very small quantity that had been taken out of the——

Q. (Interrupting) For the purpose of making chemical tests? A. Yes, sir.

Q. And you determined that all of these exhibits contained smoking opium or yenshee?

A. Yes, sir.

Mr. Hedlund: You may cross-examine.

Mr. Hannon: No cross-examination.

Mr. Hedlund: That is all, Mr. Ringstrom. You may step down.

(Witness excused.)

Mr. Hedlund: Call Mr. Giordano.

(Henry L. Giordano was thereupon produced as a witness in behalf of the United States of America and was duly sworn.)

Mr. Hedlund: Pardon me, your Honor, I wanted to be sure that I had not missed any exhibits. Would you permit me to recall the witness.

(The witness Henry L. Giordano was then excused [9] from the witness stand.)

(Testimony of Hugo Ringstrom.)

Mr. Hedlund: Mr. Ringstrom, will you resume the stand, please.

HUGO RINGSTROM

thereupon resumed the stand as a witness in behalf of the United States of America and was examined and testified further as follows:

Direct Examination (Resumed)

Mr. Hedlund: Q. Mr. Ringstrom, do you have another exhibit that pertains to this case, or allegedly pertains to this case? A. Yes, sir.

Mr. Hedlund: Will you hand it to the reporter to be marked for identification.

(The object referred to, so produced, was thereupon marked for identification as Governmen's Exhibit 11.)

Mr. Hedlund: Hand it to the witness, please.

Q. Will you tell us what that is?

A. It is eight bindles of smoking opium.

Q. Now, did you receive that under the same conditions as you did the other three exhibits to which you testified?

A. Yes, sir. I wish to make a correction. It is nine bindles, instead of eight bindles.

Q. Nine bindles of smoking opium?

A. Yes.

Q. And can you testify substantially to that, as far as posses- [10] sion and the way you got it and when you got it and from whom you got it, as you did on the other three exhibits? A. Yes, sir.

(Testimony of Hugo Ringstrom.)

Q. And is it in the same, or substantially the same, condition as it was when you first received it?

A. It is.

Mr. Hedlund: You may cross-examine.

Mr. Hannon: None.

Mr. Hedlund: That is all, thank you, Mr. Ringstrom. Step down.

(Witness excused.)

Mr. Hedlund: Mr. Giordano.

HENRY L. GIORDANO

was thereupon produced as a witness in behalf of the United States of America and, having previously been duly sworn, was examined and testified as follows: [11]

Direct Examination

By Mr. Hedlund:

Q. Your name, please?

A. Henry L. Giordano.

Q. And by whom are you employed?

A. Bureau of Narcotics.

Q. And how long have you been so employed?

A. A little over two years.

Q. And where were you educated?

A. University of California.

Q. Did you take a degree there?

A. Yes, sir.

Q. And what was the degree?

(Testimony of Henry L. Giordano.)

A. Degree of Pharmacy.

Q. And about how old are you?

A. Twenty-eight.

Q. And after you finished school what line of work did you follow?

A. Worked as a pharmacist.

Q. Where?

A. At San Francisco, California.

Q. For how long?

A. For approximately seven years.

Q. Up until the time you started working for the Government? A. Yes, sir. [12]

Q. As a Narcotic Agent? A. Yes, sir.

Q. Now, Mr. Giordano, are you acquainted with the defendants Wong Suey, Nee Toy, Wong Chin Pung, James Wong, and Louis Jung alias Gar Foo?

A. Yes, sir.

Q. Now, in connection with your acquaintance with them, do you recall on the evening of January 12th, 1943 your activities? A. Yes, sir.

Q. Will you narrate to the Court just what you did, what you saw, and conversations that were had in the presence of the defendants, starting about the time of about eight o'clock in the evening.

A. About eight o'clock in the evening of January 12th, in company with Agent Doolittle, I arrested Harry Lee, and following his arrest, why, he took us up to 318 Southwest 2nd, and——

Q. (Interrupting) About what time was that?

A. That was about around nine or nine-thirty—and showed us the location of a certain doorway up

(Testimony of Henry L. Giordano.)
there, and we returned to the Customs Building, and about around midnight of January 12th, in company with Agents Doolittle, Smith and Richmond I followed Harry Lee into 318 Southwest Second——

Q. (Interrupting) Now, just one moment. Prior to your doing that did you make any arrangement with Harry Lee?

A. Yes, sir, prior to that Harry Lee had been searched and [13] furnished fifty dollars marked money for the purpose of making a purchase out of room 10 at 318 Southwest Second. The——

Q. (Interrupting) Now, right now let's get the numbers on that marked money. Can you give it to us. Well, we will wait and do that later. Go ahead and tell us what else, if you will.

A. The arrangements made with Harry Lee were that we would go about midnight because at that time the bosses of the opium establishment there would change shift, and so I followed Harry Lee up the stairs to the third floor.

Q. Now, who was with you besides Harry Lee?

A. Agents Doolittle, Richmond and Smith.

Q. Now, were there other agents around there that you know of of your own knowledge?

A. Agent or District Supervisor Bangs was in the vicinity.

Q. And any others?

A. There were some Customs Agents also with Mr. Bangs.

(Testimony of Henry L. Giordano.)

Q. Names?

A. Customs Agents Lindy and Turner.

Q. All right, now, go ahead. You went up to the third floor, I believe you said.

A. Yes, sir.

Q. At 318 Southwest Second.

A. Yes, sir.

Q. And in what city was that?

A. In Portland, Oregon. [14]

Q. State of Oregon? A. Yes, sir.

Q. All right, proceed.

A. I followed Harry Lee to the third floor and I observed him place a coin at the right side of the door of room 10, and following that he entered the door of room 10. There was a light burning over the stairway, which was right next to the room 10 doorway, and I turned that light out and then I took a position opposite the doorway of room 10.

Q. Now, was this just prior to the time that Harry Lee entered?

A. That was following the entrance of Harry Lee.

Q. Did you observe anything at the time he went in?

A. Yes, there was a very strong odor of smoking opium in the hallway.

Q. All right, continue, please.

A. After turning the light out I took that position opposite the door of room 10, and a few minutes later the door opened and James Wong——

(Testimony of Henry L. Giordano.)

Q. (Interrupting) You didn't know his name at that time?

A. I didn't know his name at that time, no, but a Chinese later identified as James Wong came out the door. As the door was opened I could see into the room. There were two doors, and both of them were momentarily opened and I could see a—there was a person lying on a flat table in the room with smoking equipment alongside of him,—that is, the pipe and the [15] lamp.

Q. You couldn't identify who that was?

A. No, sir.

Q. Go ahead.

A. At the same time a strong odor of smoking opium came out of the doorway, and as James Wong came out I took him by the arm and led him over to the stairway, where Agent Doolittle was waiting, and turned him over to Agent Doolittle, who led him down the stairs. I again returned to my position opposite the door, and a few minutes more elapsed and the door again opened to room 10 and I could again see in the room and saw the same person—that is, saw the form of a person lying on the bunk with the smoking equipment, and the smoking opium odor was very strong again as the door opened, and this time Harry Lee came out of the door and I took hold of him and he advised me that he had got the stuff, and I was just about to go over to the stairway with him when the door started opening again, so I stayed right in the position I was and the door opened

(Testimony of Henry L. Giordano.)
again and this time a Chinese that was later identified as Wong Suey came out of the door. I took him by the arm and led him over to the stairway where Agent Doolittle was standing and turned him over to Agent Doolittle, who led him down the stairs. I then took——

Q. (Interrupting) Where was Lee during that period?

A. Lee was right alongside of me during that.

Q. All right.

A. I then took Harry Lee back to the door from the stairway [16] where I had turned Wong Suey over to Agent Doolittle and I stood him right directly in front of the door of room 10. I took a coin that I placed at the contact on the right side of the door, two nails.

Q. In other words, contact between two nails that were set parallel with each other?

A. Yes, sir.

Q. Or alongside of each other, that made a contact? A. Yes, sir.

Q. Go ahead.

A. I could hear a sound in the room as I touched that contact and the first door opened and Harry Lee stepped in and I stepped in behind him and crouched down behind him between the first and second doors. There was some Chinese conversation between Harry Lee and somebody on the other side of the door, that is, the second door, and in just a short period of time the second door was opened.

(Testimony of Henry L. Giordano.)

Q. Now, just one moment. That second door, can you describe it? A. Yes, sir.

Q. Did it have a window in it?

A. It had a round hole in the door about an inch in diameter, or maybe a little bit larger than that.

Mr. Hedlund: I would like to have the door over there marked.

(The door referred to was thereupon marked for [17] identification as Government's Exhibit 12.)

Mr. Hedlund: May I ask that the witness be permitted to step down and go over and examine Government's Exhibit 12.

The Court: Well, does he need to go? Can you identify the door?

Mr. Hedlund: I would like to have him point out the peek-hole, or whatever it is.

The Court: There it is.

Mr. Hedlund: Q. Now, is that Government's Exhibit 12 the door that you have reference to?

A. Yes, sir.

Q. That is the second door, or inner door?

A. The inner door.

Mr. Hedlund: We introduce that in evidence.

Mr. Hannon: No objection.

The Court: Received.

(The door referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 12.)

(Testimony of Henry L. Giordano.)

Mr. Hedlund: Q. Now, go ahead. You were down behind Mr. Lee, as I understand?

A. That is correct.

Q. Now go ahead and tell what happened.

A. The second door opened and Harry Lee stepped into the room [18] and I stepped in right behind him. As I entered the room I observed three Chinese in the room.

Q. Now, who did they later——

A. (Interrupting) They were later identified as Nee Toy, Louis Jung alias Gar Foo, and Wong——

The Court: (Interrupting) Now, you keep saying they were later identified. All these Chinamen are sitting in front of you, down there behind their attorneys. When you use these names do you mean the defendant Chinamen that are here in court now?

A. Yes, sir, your Honor.

The Court: You meant that awhile ago about Wong and Wong Suey? A. Yes, sir.

Mr. Hedlund: Well, at that time you didn't know who they were? A. No, sir.

Q. That is the reason you say they were later identified? A. Yes, sir.

The Court: What I want to know is, does he know now that they were the defendants?

A. Yes, your Honor.

Mr. Hedlund: Q. Very well, continue.

A. And also Wong Chin Pung alias Wong Ben, who is present.

(Testimony of Henry L. Giordano.)

The Court: What were their names? [19]

A. Nee Toy, Louis Jung alias Gar Foo.

The Court: All right.

A. And Wong Chin Pung alias Wong Ben.

The Court: All right.

Mr. Hedlund: Now, what were their positions there in the room when you first walked in?

A. As I walked in Louis Jung was just stepping out from behind a desk that was on the left far side of the room in the corner.

Q. All right; and where were the other two?

A. Nee Toy was standing by one of the bunks or tables that was situated on the left side of the room against the wall, and Wong Chin Pung was standing near the door.

Q. Near the door that you just entered?

A. Yes, sir.

Q. Now, what did you do then?

A. I immediately took them into custody and told them to line up on the far side of the room, as there was a red-hot stove going and I wanted to get them out of the way of destroying any evidence.

Q. Did they comply right away?

A. Yes, sir.

Q. All right.

A. First, Louis Jung attempted to turn back and behind the desk and I stopped him right away and then told them to get on the other side of the room. The first door had closed behind me as I came [20] in, so I had to pull a cord that was situated as you—as you left the door it was on

(Testimony of Henry L. Giordano.)

the left side of the door; it was a cord like a pulley, and I pulled that cord and I allowed—it opened the door and Agents Doolittle and Richmond entered the opium den.

Q. Richmond is now in the Navy?

A. Yes, sir.

Q. All right, go ahead.

A. Also, when I entered the room there were three tables that contained—each table had a complete smoking equipment outfit, that is, a tray, a lamp, and pipe bowl and yen hocks and yen gows, and all the equipment used for smoking opium, and the lamps in each of these three—or each of these three lamps were burning.

Q. Very well. Now, what did you do after that, after Doolittle and Richmond came in?

A. I then walked over to the desk behind which Louis Jung was standing when I entered the room and pulled the drawer out that was in the desk, and in that drawer I found two jars of smoking opium, seven packages of smoking opium containing forty-eight bindles, a total of forty-eight. There were also fourteen loose bindles packed in the drawer; and there was approximately ninety dollars in money in the drawer.

Q. Now, just one moment. Will you hand the witness Exhibit 8 for identification. [21]

The Court: Were there people smoking in there?

A. Not when I entered, your Honor.

Mr. Hedlund: Well, while we are about that, I will ask you, did you examine these pipes?

(Testimony of Henry L. Giordano.)

A. Yes, sir.

Q. What can you say as to whether they were hot or cold?

A. I couldn't say as to that, sir. I didn't examine them for a little while, until a little while after, but there was yen shee residue in all the pipes.

Q. But you did not examine them as to whether they were hot or cold? A. No, sir.

The Court: Did I understand that when you first had a look through there from the outside there were people that were smoking lying in the bunks? A. Yes, your Honor.

Mr. Hedlund: Q. Now, you have been handed Exhibit 8 for identification and I ask you to examine it and tell us if you know what it is?

A. It is the smoking opium that was found in the drawer that was in the desk.

Q. Well, now, was that all that you found in the desk? A. No, sir.

Mr. Hedlund: All right, we will introduce that in evidence. We offer that in evidence. [22]

Mr. Hannon: No objection as far as I am concerned.

The Court: Admitted.

(The objects referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 8.)

Mr. Hedlund: Q. Mr. Bailiff, will you please hand the witness Exhibit 9 for identification, and

(Testimony of Henry L. Giordano.)
we ask that you examine that and tell us if you know what it is?

A. This is nine packages of yen shee that we also found in the cash drawer?

Q. In the desk?

A. The drawer that was in the desk.

Mr. Hedlund: We offer it in evidence.

Mr. Hannon: No objection.

The Court: Admitted.

(The objects referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 9.)

Mr. Hedlund: Hand the witness Exhibit 10 for identification.

Q. I ask that you examine it and tell us if you know what it is. Go ahead and answer the question.

A. It is eight packages of—that is eight separate packages, each containing ten bindles of smoking opium. [23]

Q. And have you ever seen that before?

A. Yes, sir.

Q. Where?

A. It was in the wood pile that was in room 10.

Q. In the wood pile, concealed in the wood pile?

A. Yes.

Mr. Hedlund: We offer that in evidence.

Mr. Collier: No objection.

Mr. Hannon: No objection.

The Court: Admitted.

(Testimony of Henry L. Giordano.)

(The objects referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 10.)

Mr. Hedlund: Q. Now, I think you examined the drawer? A. Yes, sir.

Mr. Hedlund: Now, I wonder if we can have this drawer marked for identification with its contents. Just leave them all together.

(The drawer, containing various objects, was thereupon marked for identification as Government's Exhibit 13.)

Mr. Hedlund: Will you show that to the witness, please. Now, is that the drawer that you have reference to in your testimony?

A. Yes, sir. [24]

Q. I don't suppose that things are well sorted out there. Can you tell us some of the things that you found in the drawer at that time?

A. Yes; I also found a box like a cigar box that had a—that contained a padlock, and found several round claws that were used in smoking, it was used to hold the pipe bowl on the stem; and there was also some bindle papers, plain bindle papers,——

Q. (Interrupting) Are they in there?

A. Yes,—the same color as what the other bindles were wrapped in that contained opium. And there was also an envelope in there that contained approx-

(Testimony of Henry L. Giordano.)
imately nine sheets of paper with Chinese characters written on them.

Q. Is that in there right now? A. Yes.

Mr. Hedlund: I would like to have that marked for identification, separately.

(The envelope referred to was thereupon marked for identification as Government's Exhibit 14.)

Mr. Hedlund: Q. All right, go ahead. What else did you find?

A. There were some lottery tickets, plain lottery tickets, in here, and a couple of empty jars and a couple of pipe bowls.

Q. Are those pipe bowls in there?

A. Yes. Here is one.

Q. There are some things in there that were not in that drawer [25] at that time?

A. That is correct.

Q. Can you take them out, please. Just put them aside over there for the moment. Just put them aside, Mr. Bailiff, those things that he takes out. Was the cigar box in there?

A. That was inside, yes.

Q. What was in the cigar box?

A. The padlock.

Q. Hand the witness Government's Exhibit 2. Is that the lock to which you refer to?

A. Yes, sir.

Q. All right, go ahead. What else did you find?

(Testimony of Henry L. Giordano.)

A. There was a Chinese scale, and the sum of money, approximately ninety dollars.

Q. Now, do you have that money there?

A. Yes.

Q. Will you hand that to the reporter for the purpose of marking for identification. Is that in just one package? A. Two.

Mr. Hedlund: Separate packages. Have them marked separately.

(The two envelopes and contents were thereupon marked for identification as Government's Exhibits 15 and 16.)

Q. Now, have you that drawer in approximately the same shape that you found it, with the exception of the withdrawal of the [26] cigar box and the account book and the two exhibits containing money? A. And the smoking opium.

Q. And the smoking opium.

A. And the yen shee.

Q. All those things were removed?

A. Yes, sir.

Q. And, other than that, that drawer is approximately in the same shape?

A. Approximately, yes.

Mr. Hedlund: We will offer that in evidence.

Mr. Hannon: No objection.

The Court: Admitted.

Mr. Collier: I don't know, your Honor, whether we need separate objections made in this case or not. There is no evidence adduced thus far, at

(Testimony of Henry L. Giordano.)

least nothing here, that is connected in any way at least with the defendant Nee Toy, and I want to preserve the record on that. None of these exhibits introduced thus far that have been in any manner, shape or form connected up with Nee Toy.

The Court: He testified that Nee Toy was in the room.

Mr. Collier: Yes, but none of these exhibits were connected up with him.

The Court: Admitted.

(The drawer referred to, so offered and received, [27] having previously been marked for identification, was thereupon marked received as Government's Exhibit 13.)

Mr. Hedlund: Now we offer Exhibit 2.

The Court: Exhibit 2 has been offered.

Mr. Collier: Same objection as to Nee Toy.

The Court: Admitted provisionally.

(The object referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 2.)

Mr. Hedlund: And Exhibits 15 and 16 are offered in evidence.

The Court: Fifteen and 16 have been offered.

Mr. Hannon: I have no objection.

Mr. Hedlund: That is the money, two packages containing money.

Mr. Collier: Well, I make the same objection as to Nee Toy.

(Testimony of Henry L. Giordano.)

(The two envelopes containing money, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 15 and 16.)

Mr. Hedlund: We offer Exhibit 14 in evidence.

The Court: Fourteen has been offered. Fourteen has been offered.

Mr. Collier: Same objection. [28]

The Court: Admitted provisionally.

(The envelope referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 14.)

Mr. Hedlund: Q. Have I missed anything that you found in that drawer, now, Mr. Giordano?

A. No, the only other thing was this pad of paper that was the same as some of the paper in that envelope.

Q. Exhibit 14?

A. Yes,—that had the notation in Chinese characters, and the money bag, empty.

Q. What did the cigar box contain?

A. That just contained the lock.

Q. The padlock?

A. The lock, and also a small key in it.

Q. There was no key in the lock that you found?

A. No, sir.

Q. Now, chronologically, go ahead. What occurred next?

(Testimony of Henry L. Giordano.)

A. Let's see,—after I took the drawer out I set it on top of the table and just left it there, and then Agent Smith went out to call up District Supervisor Bangs, who was waiting outside, and when he returned, why, we questioned the defendants, the people that were in there, as to their names, and each one gave us their name. [29]

Q. Now, what name did each of them give you? First,—well,—point them out as you go.

A. The first man on the right here gave the name of Louis Jung.

The Court: To your right?

A. To my right, yes, sir.

Mr. Hedlund? Q. Did you ever know him by any other name? A. Yes, Gar Foo.

Q. Have you ever known his Chinese name?

A. I believe it is Louis Gar Foo.

Q. Louis Gar Foo. All right, go ahead.

A. And the man next to him gave his name as Nee Toy; and the third man——

Q. (Interrupting) Did you ever know him by any other name?

A. Nee Toy or Toy Nee, sometimes with——

Q. (Interrupting) What is his Chinese name, if you know?

A. I believe it is Nee Toy.

Q. Sometimes written Toy Nee? A. Yes.

Q. Go ahead.

A. The next man gave his name as Jimmie Wong, or James Wong.

Q. Is that what he first told you?

(Testimony of Henry L. Giordano.)

A. Well, the first time I talked to him he gave that as his name. Of course, he had been talking to some of the other men previously.

Q. Do you know his Chinese name? [30]

A. No, I don't.

Q. That is the only name you ever knew him by?

A. Yes, sir.

Q. Go ahead.

A. The next man gave his name as Suey Wong or Wong Suey.

Q. Do you know his Chinese name?

A. No, only as Wong Suey.

Q. All right, go ahead.

A. And the next man gave his name as Wong Ben.

Q. As Wong Ben? A. That is correct.

Q. And then you subsequently found out——

A. (Interrupting) Wong Chin Pung.

Q. Do you know his Chinese name?

A. I believe it is Wong Chin Pung.

Q. That is his Chinese name, as far as you know? A. Yes.

Q. Proceed with the chronological order of what you did.

A. There were several coats on the wall in back of the desk where this drawer was taken from, and there was a jacket on the wall which Louis Jung claimed was his jacket.

Q. Hand the witness Exhibit 3. Can you tell us what that is, Mr. Giordano?

(Testimony of Henry L. Giordano.)

A. Yes, this is the jacket that was hanging on wall that Louis Jung claimed was his. [31]

Q. Now, where was that with reference to this table? A. Right behind this table.

The Court: What table?

Mr. Hedlund: Q. What table?

A. The table that this drawer was found in,—and was on the left far side of the room.

The Court: I thought the drawer was in a desk.

A. Well, desk, your Honor.

Mr. Hedlund: Q. Desk, instead of table?

A. Yes.

Q. How was that table arranged with reference to the wall?

The Court: Desk or table? Call it one or the other.

Mr. Hedlund: The desk, I beg your Honor's pardon. How was it arranged with reference to the wall?

A. There was a space behind the desk about—just enough for a man to sit behind there, and it was parallel to the back wall and up against the side wall.

Q. And there were hooks above it?

A. Right behind where the man was sitting.

The Court: How big a room was this, about?

A. Oh, about nine by twenty, nine feet by twenty.

Mr. Hedlund: Q. Well, tell us a little more about the description of that room. How many chairs or tables were there?

A. There were three tables that were——

(Testimony of Henry L. Giordano.)

The Court: (Interrupting) Go ahead. [32]

A. There were three tables, one directly as you cam in the room, right against the wall, about three feet high, and it had a mat on it, and there was also the smoking opium equipment, the lamp and the pipe, on that table; and there was an identical table on the left side of the room as you came in that also contained the smoking opium equipment; and on the right side of the room, against the wall, there was a third table that contained the lamps and pipes, and so forth.

The Court: Then there were bunks between the tables and the wall?

A. The bunks were the tables, your Honor. They were a low table. And there was a wood pile on the right far side of the room.

Mr. Hedlund: Q. Just one moment. Let's get some pictures in here. Will you have that marked for identification, please.

(An envelope containing a number of pictures was thereupon marked for identification as Government's Exhibit 17.)

Mr. Hedlund: Now, your Honor, in connection with this particular exhibit that I may offer, I don't want it thought by any means that this picture was taken at the time that these men were lying there, but simply to show the Court how the bunks appeared. In other words, these men——

The Court: (Interrupting) When were they taken?

(Testimony of Henry L. Giordano.)

Mr. Hedlund: They were taken the following morning.

The Court: Were the conditions the same as they were the [33] night before?

Mr. Hedlund: Exactly, your Honor, with the exception that we requested the defendants—evidently several of the defendants were requested to lie down to show the position that they took in these various bunks.

The Court: Give him the whole bunch of pictures, in the interest of speed here.

Mr. Hedlund: Let's mark them all at once.

The Court: Well, hand them over to the lawyers first and let them examine them.

Mr. Hedlund: Can these be clipped together, along with that one exhibit?

The Court: They will all be put in a separate envelope and, Captain Rauch, mark them later. Now, I will ask you, you know these pictures, do you? A. Yes, sir.

The Court: They were in the same condition that they were that night?

A. That is correct, your Honor.

The Court: We understand about that.

Mr. Hedlund: With the one exception that there were no persons on the bunks that night. We will offer that in evidence.

The Court: Admitted.

(The envelope containing said pictures, so offered and received, having previously been

marked [34] for identification, was thereupon marked received as Government's Exhibit 17.)

A. There was a coat hanging on the wall, and which Wong Chin Pung was allowed to put on. It matched his pants that he had on at that time.

Mr. Hedlund: Q. And that coat was where?

A. Hanging on the wall behind the desk.

Q. Alongside of this one?

A. Yes, sir. There were several keys on Louis Jung's person that Agent Richmond tried one of the keys and found that it fitted the lock that was found in this drawer.

Q. And that was found on whose person?

A. On Louis Jung's person.

Q. And is that one that is now in the hands of the witness?

A. These are the keys that were found by Agent Richmond on Louis Jung's person in my presence.

Q. And that is attached now to Exhibit 2, that you found in the drawer?

A. Yes, and it works this lock.

Mr. Hedlund: We offer that in evidence.

The Court: Admitted.

(The key referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 1.) [35]

Mr. Hedlund: We offer the jacket.

The Court: Admitted. Do you mean the coat?

Mr. Hedlund: This jacket, sports jacket.

(Testimony of Henry L. Giordano.)

The Court: I don't care whether it is a jacket or a coat. Are there two pieces of clothing? You talked about a coat that one claimed. Just now you talked about a coat that another one claimed.

Mr. Hedlund: This is the coat. We don't have the jacket.

The Court: Move along. Exhibit 3 received.

(The coat referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 3.)

The Court: This was all in Portland, Oregon?

A. Yes, your Honor.

Mr. Hedlund: Hand the witness Exhibits 4, 5, 6 and 7.

The Court: What are you going to do about this money? Are you going to connect up the money?

Mr. Hedlund: Yes, your Honor.

The Court: Do it now.

Mr. Hedlund: Q. Which of those exhibits contains marked money? The first one—they are marked 15 and 16. Well, hand them both.

A. I didn't examine those.

The Court: How close was this to the Police Station? [36]

A. About—less than half a block, your Honor.

The Court: Which direction?

A. South.

The Court: Across the street?

(Testimony of Henry L. Giordano.)

A. South and across the street.

The Court: Upstairs?

A. Yes.

The Court: Second floor?

A. Third floor.

The Court: What was on the first floor and the second floor?

A. The first floor was the ground floor. The second floor was the——

The Court (Interrupting): What was on the first floor?

A. They had a store downstairs.

The Court: Whose store?

A. I don't know, your Honor. I can't recall at this time.

The Court: What was on the second floor?

A. They had a clubroom and various living quarters.

The Court: Whose clubroom?

A. Musicians, Chinese musicians.

The Court: Who owned the building?

A. The building was owned by John Middleton.

The Court: John who?

A. Middleton,—and leased by Frank Sue.

The Court: Go ahead about the marked money. [37]

Mr. Hedlund: Q. Now, examine those two exhibits, 15 and 16.

A. Well, they are sealed.

(Testimony of Henry L. Giordano.)

Q. Well, unseal them; examine the contents of them. Which exhibit is that, please, Witness?

A. Exhibit 16 is the marked money.

Q. Now, you have examined the contents?

A. Yes, sir.

Q. When was that envelope sealed, if you know?

A. That was sealed on January 13th, approximately about six——

Q. (Interrupting): In the morning?

A. In the afternoon, six p.m.

Q. In the evening? A. Yes.

Q. And do you know who did it?

A. Yes, I was present and Agent Doolittle sealed it.

Q. Look at the money a minute and note particularly the serial numbers on the bills. Had you ever seen that money prior to the time that you went into this opium den?

The Court: Don't call it a den. Just call it——

Mr. Hedlund (Interrupting): Room 10.

The Court: I see all the pictures are marked "den". It is like calling the defendants thieves.

A. I can't say, because we have a list made up of the numbers of the marked money.

Mr. Hedlund: Q. You don't recall the numbers offhand? [38]

A. I don't recall the numbers offhand.

Mr. Hedlund: Very well.

The Court: Where was this money found?

A. In the cash drawer, your Honor.

The Court: In the cash drawer?

(Testimony of Henry L. Giordano.)

A. Yes, in this drawer.

The Court: Is that the ninety dollars?

A. This is the fifty, that is, the marked, and the balance, $39.50, was found with it.

The Court: Well, the Government's theory is that these three bills, a twenty, twenty, and a ten, were given to Harry Lee?

Mr. Hedlund: Yes, your Honor.

The Court: That is the way you expect to connect it up?

Mr. Hedlund: Yes, your Honor.

The Court: And they were found in the drawer of this desk?

A. Yes, your Honor.

Mr. Hedlund: Q. Now, the other money you had never seen before to your knowledge?

A. Until it was found in the drawer.

Q. Now, you were handed Exhibits 4, 5, 6 and 7. Have you examined those? A. Yes, sir.

Q. Do you know what they are?

A. I know what they are, yes, sir. [39]

Q. Have you ever seen them before?

A. Yes, but I was not present when they were found.

Q. Well, did you see them up there in that room that night? A. No.

Mr. Hedlund: Very well.

The Court: I don't see that we need to identify everything you found in that room.

Mr. Hedlund: Your Honor, I was mistaken.

(Testimony of Henry L. Giordano.)

Those four exhibits were found in another place. I will have to connect that up. I am sorry.

Q. Now, you made the examination and you found this opium in the woodpile, is that right?

A. I didn't find it, no, but I——

Q. (Interrupting): You were present when it was found?

A. No, but it was pointed out to me later by one of the other men present.

Q. Who was that?

A. I believe it was Mr. Bangs.

Q. Now, at any time that you saw any of the exhibits which you have stated were opium did you ever see any tax stamps on them or any containers from which they came?

A. No, sir, no tax stamps or any containers.

The Court: Did you see anybody, up until this time in your narrative, other than these five defendants and the two men—I believe you said it was two—that you saw through the door [40] that were lying on a table who weren't there when you went in?

A. One was on a table.

The Court: One—who weren't there when you went in?

A. Well, I couldn't say that, but I couldn't identify it with any one of the parties that was inside.

The Court: It might have been one of the five defendants?

A. Yes, sir.

(Testimony of Henry L. Giordano.)

The Court: But you couldn't see anyone up to this time in your narrative except the five defendants, except the possibility of this other one that was lying on the table; isn't that right?

Mr. Hedlund: Q. Didn't you see some older man come down the hall that was living there in the place?

A. No, sir.

Q. You didnt' see that? A. No, sir.

Q. Of course, you saw nobody coming up from downstairs? A. No.

The Court: Well, so far as you know, there were just these five defendants in the room?

A. Yes, sir.

The Court: With the exception of possibly this one man that you saw lying on the table?

A. Yes, sir.

Q. Was there a possibility of getting out through some other door? [41]

A. There was a trap door that was closed, but he couldn't have gotten out because it went down to another room, 2, and there were other agents covering that.

The Court: Then that eliminates the possibility that you saw six men?

A. Yes, sir, your Honor.

The Court: Was that one that you saw on the table smoking?

A. Yes, sir.

The Court: Did any of these defendants show

(Testimony of Henry L. Giordano.)
signs of being under the influence?—Is that the way you speak of it in the trade?

A. The only way you could tell would be the odor of the opium on their breath, and it was so strong in the room that you couldn't tell by that.

The Court: Were there any other doors to this room 10?

A. No, your Honor. It was completely paneled with plywood all the way around, and the window was boarded up with plywood.

The Court: Was there any top door up, or was that the top story?

A. That was the top story, your Honor.

The Court: How was the room lighted?

A. I believe there was two globes.

Mr. Hedlund: Q. Now, did you have Harry Lee in the room there all the time?

A. All the time, yes. [42]

Q. Did you examine his pockets, or was that done while you were watching?

A. It was done, yes. I wasn't present.

Q. You were not present? A. No.

Q. Where had you gone?

A. At that time there were several other investigations that were going on and we had planned the arrests for the evening, or that morning.

Q. So you made no further examination of Harry Lee after that? A. No, sir.

The Court: Was this the night of the 12th or the morning of the 13th?

(Testimony of Henry L. Giordano.)

A. It was the night of the 12th and morning of the 13th.

Mr. Hedlund: Q. Of January, 1943?

A. Of January, 1943.

The Court: The night of the 12th and 13th.

A. The night of the 12th and then the morning of the 13th.

The Court: When you spoke of sealing that money awhile ago it was the next evening, about six o'clock?

A. It was on the 14th, your Honor.

The Court: The 14th?

A. Yes.

Mr. Hedlund: Q. Do you know who took Harry Lee away?

A. No, I don't [43]

Q. He was still in the room when you left?

A. That is correct.

Q. Very well. You made no examination of any of the defendants, other than what you have testified to, there? A. That is all.

Mr. Hedlund: That is all; you may cross-examine.

The Court: In this case you may both examine, if you wish.

Mr. Hannon: Thank you, your Honor.

Cross-Examination

By Mr. Hannon:

Q. What is your name, again?

A. Henry L. Giordano.

(Testimony of Henry L. Giordano.)

Q. Sometimes known here around in the underworld as Harry, or Dick—or Henry?

A. Henry.

Q. How long have you been in Portland now, Mr. Giordano?

A. Oh, approximately eight months, eight or nine months.

Q. You are working out of your head office at Seattle? A. Yes, sir.

Q. How long have you been acquainted with Harry Lee?

A. Been acquainted with Harry Lee since about the middle of October, 1942.

Q. 1942. When would you say that would be? In June, 1942? October, you said. [44]

The Court: Let me get Harry Lee in mind. Is he one of the defendants yet to be tried?

Mr. Hedlund: Yes, your Honor.

The Court: Represented by whom?

The Clerk: Everett Adcock.

Mr. Hedlund: Adcock, yes, your Honor.

The Court: He is the defendant that is living in Tacoma now?

Mr. Hedlund: Yes, your Honor.

Mr. Hannon: Q. When did you say you first met Harry Lee?

A. I said about the middle of October, 1942.

Q. What was the occasion of your first meeting with Mr. Lee?

A. I was present when he sold opium to an informer.

(Testimony of Henry L. Giordano.)

The Court: Read that answer, Captain.

(The answer referred to was thereupon read.)

Mr. Hannon: Q. That is, the middle part of October, 1942?

A. Yes.

Q. Here in this city?

A. Portland, Oregon.

Q. Had you arranged with Harry for the sale or for the purchase of that opium?

A. No, sir.

Q. Were you introduced by the informer then to Harry Lee? A. That is correct.

Q. What were the circumstances under which you were introduced? [45] Who were you supposed to be?

A. At that time the party said that I was all right and told Harry Lee that I was O.K. and that I was all right to sell smoking opium, or sell me stuff, he said.

Q. Sell you stuff?

A. And then an arrangement was made whereby I would purchase—forget whether it was—just how long afterwards; a few days, or, I think, a week afterwards—that I would purchase the opium from Harry Lee.

Q. Who was the informer that introduced you to Harry Lee? A. The informer?

Q. Yes. A. Harry Clements.

Q. He is the same one that introduced you to Mrs. Redner, too, in that Redner case?

(Testimony of Henry L. Giordano.)

A. Yes, sir.

Q. Then when do you say you next had business transactions with Harry?

A. I had several transactions—let's see, I had about two transactions, two or three, in October, and about three in January.

Q. These were contacts that you made direct with Harry yourself, Harry Lee?

A. Yes, sir.

Q. And, now, you said you arrested him on the 12th of January? [46]

A. That is right.

Q. What was the occasion for you arresting him?

A. On the occasion of the arrest I purchased smoking opium from him and immediately following his sale he was arrested.

Q. And then this is the same Harry Lee that took you down to 318 Southwest 3rd Street?

A. Yes.

The Court: Second.

Mr. Hannon: Q. Second.

A. Second.

The Court: Where did you make the purchase from Harry Lee?

A. Fourth and Everett.

The Court: On the street?

A. Yes, sir.

Mr. Hannon: Now, what deal or understanding did you have with Harry Lee that evening that

(Testimony of Henry L. Giordano.)
he took you down there? What was the understanding that you were to do for him?

A. Well, when Harry Lee was arrested the transaction was made on the corner of 4th and Everett, and I waited in the car for him there and he would walk along the street and when he would see me there he would come over to the car and ask me how many I wanted and then go back and then come back with the opium, and then immediately following his arrest—that is, he got in the car and made the sale. and then Agent Doolittle came right behind him and he arrested him, and Agent Doolittle just [47] stopped him and said, "You are under arrest, Harry, Federal officers", and he started hollering, "You don't want me, you don't want me," he said, "You want the big bosses down town," he says, "in the hop joint." He says, "They are the ones. You don't want me," he says, "I will take you down there." And so then he was taken over to the Customs Building and we talked to him, asked him what he meant by "the big bosses", and he told us that we didn't want him, he was just a small fry, that we wanted to get the bosses in the hop joint. He named Wong Suey and Louis Jung, the big bosses.

Q. Now,——

Mr. Hedlund (Interrupting): That is responsive.

The Court: Wait a minute. Do you want him to stop?

(Testimony of Henry L. Giordano.)

Mr. Hannon: Yes, your Honor. He is making a speech. He isn't answering.

Q. What did you say? What inducement or enticement or promise did you make to get him to take you down to this 318?

A. None whatsoever.

Q. Nothing, except that because of that pinch there by you and Doolittle he just volunteered all this? A. That is correct.

Q. You are sure that you or one of the other agents didn't suggest to him that you didn't really want him, but if he would help take you down to the so-called supplies, there were supplies that you were after, that you would give him consideration? [48]

A. No, sir.

Q. Didn't you in substance make that suggestion to him?

A. No, sir, because, as I testified, the defendant—or, rather, Harry Lee is the party that told us about it, what was going on.

Q. But you asked Harry where he was getting his stuff from, didn't you?

A. Didn't have a chance to. He told us.

Q. Had you ever in your sales before asked him where he got the stuff from? A. No.

Q. You are supposed to be interested in the supply, aren't you? A. That is correct.

Q. And in all these purchases you never once asked him where the stuff came from?

A. Didn't have to.

(Testimony of Henry L. Giordano.)

Q. But you never did, did you?

A. Well, he had been followed to the source.

Q. But you never asked him about it, did you?

A. No, sir, I didn't.

Q. And when that arrest was made he just volunteered this story you have given us, without any coaxing or without any promise or without any inducement from you or these other agents?

A. That is right.

Q. Just spontaneous? [49]

A. That is right.

The Court: Combustion, spontaneous combustion.

Mr. Hannon: Yes, that is right, your Honor.

The Court: Must have been scared, don't you think?

Mr. Hannon: Must have been more than scared. This was about nine o'clock at night when you accompanied Harry Lee down to 318?

A. Yes, around nine.

Q. Who else was along with the party?

A. Agent Doolittle and Agent Richmond, I believe.

Q. Well, you were all three of you walking right along together?

A. No; we went over there and Harry Lee pointed out the entrance to 318, and then Harry Lee and I went into 318 and he led me up to—showed me where the door was.

Q. And when you came out, you left 318, that was along about nine o'clock at night?

(Testimony of Henry L. Giordano.)

A. Just about.

Q. You took Harry Lee up to the Customs Office? A. That is right.

Q. And did he stay with you there, then, up until the time that you made the final raid?

A. He was there. I wasn't present all the time, but he was there under guard.

Q. He was there under guard all that time?

[50]

A. Yes.

Q. Did you make any promises about how you would help him out if he succeeded in making this arrest there? A. No, sir.

Q. Were there any other agents made that suggestion him? A. Not in my presence.

Q. Was there any talk about the supply where this stuff was coming from?

A. Yes, Harry Lee was telling us where he was getting it.

Q. Now, you were there, other agents were there. What other agents were there with Harry Lee in that time from nine o'clock up to twelve o'clock, let us say.

A. Well, there was Agent Doolittle, Agent Richmond, Agent Smith, District Supervisor Bangs, Customs Agents Linde and Turner, and I believe there was a Customs Guard around; I don't know his name.

Q. Now, didn't anybody do any talking there except Harry Lee? Didn't any of you agents do any talking at all?

(Testimony of Henry L. Giordano.)

A. Well, yes, we questioned him about the interior, how it was situated, and how many doors were there and what it was like inside, to get the general picture of what was up there on the third floor.

Q. Did any of you express any appreciation of the assistance that Harry Lee was about to give you? Did you tell him you appreciated what he was doing for you? [51]

A. I just don't quite get your question there.

Mr. Hannon: Read the question, Mr. Reporter.

(The question was thereupon read.)

A. No, I didn't. I don't know if any of the other agents did.

Q. Did you hear any of the other agents do it? A. No, sir.

Q. Then you just let Lee do all the talking there, without any coaxing or any prompting, or anything of that kind, is that right?

A. That is correct. Except asking him questions in regard to the general scheme of things on the third floor.

Q. Did Lee ask you or suggest to you or any other agent there that for what he was about to do for you there he expected some consideration?

A. Why, the statement, he says, "You don't want me"; that is about the only remark he made in that sense.

Q. Now, when he did make that statement, "You don't want me", didn't one of you respond, "No,

(Testimony of Henry L. Giordano.)

Harry, we don't want you. We want the source"?

A. No, sir.

Q. Did you tell him you did want him?

A. I don't think we had to tell him. We had him.

Q. But did you tell him that? A. No, sir.

Q. Now, is Harry Lee out on bail? [52]

A. I believe so. I don't know.

Q. Do you know what his bail is?

A. No, sir.

Q. Now, did you talk to Harry after the arrest on the 12th of January?

A. On the 12th?

Q. The arrest was on the 12th.

A. That is correct.

Q. Did you talk to him after that?

A. Yes, sir.

Q. He has been constantly in your company and association, has he? A. No, sir.

Q. Do you see him quite often?

A. No, sir.

Q. Now, around about twelve o'clock, as you went down the street to make this raid, Doolittle, yourself, and who else was along? What other officers? A. Richmond and Smith.

Q. Richmond and Smith; and you walked ahead with Lee on the street as you were going down?

A. Well, no, Harry Lee walked first and I walked a couple of steps behind him, and then the other agents followed behind us.

(Testimony of Henry L. Giordano.)

Q. And what conversation, if any, did you have with Harry as you were going down the street? [53]

A. I don't recall. I don't recall just what the conversation was.

Q. Now, you have arrived at Second.

A. Uh-huh.

Q. Who preceded up the stairs, you or Harry?

A. Harry.

Q. You followed him? A. Uh-huh.

Q. Where were the other officers?

A. They were right behind Harry Lee and myself.

Q. Now, had Harry Lee entered the room after Jimmy Wong came out?

A. Previous to anybody leaving he entered.

Q. Harry was in there first? A. Uh-huh.

Q. And as Harry opened the door you were able to see into the room, were you?

A. Not when he went in, no, sir.

Q. How far were you standing away from the door? A. Pardon?

Q. How far were you away from the door?

A. When he entered the room?

Q. Yes.

A. I was standing right by the stairway, right next to the door. [54]

Q. Well, that doesn't give me an answer. I don't know how the stairway is located with reference to the door. Would you say it is ten or fifteen feet?

A. No, just a matter of a couple of feet.

(Testimony of Henry L. Giordano.)

Q. A couple of feet? A. Yes.

Q. You were standing that close to the door?

A. Yes.

Q. Were you in a position to see into the room?

A. No, sir, not at that time.

Q. And did you afterwards change your position? A. Yes, sir.

Q. Where did you go then?

A. Right opposite the door to room 10.

Q. And about how far were you from the door then?

A. A matter of about the width of the hall, so I would say it was about three or four feet—three feet, four feet.

Q. Were you standing in direct line with that door? A. Yes, sir.

Q. And when Jimmie Wong came out could you see? A. Yes, sir.

Q. The lights didn't have any tendency to blind you? A. No, sir.

Q. Approximately how long would you say it took the door to close? [55]

A. A couple of minutes, I guess.

Q. A couple of minutes. And when Jimmie Wong came out you were able to see in, and could you recognize anybody in the room?

A. No, I could not.

Q. You couldn't recognize anybody in the room?

A. No.

The Court: Was Lee in there then?

Mr. Hannon: Lee was in the room.

(Testimony of Henry L. Giordano.)

The Court: At that time?

Mr. Hannon: Yes.

The Court: And hadn't come out?

Mr. Hannon: And hadn't come out.

A. Yes.

Q. And the first one to come out after Lee went in that room was Jimmie Wong?

A. Yes, sir.

Q. Was Jimmie fully dressed?

A. Yes, sir.

Q. Did he have his overcoat on?

A. Yes, sir.

Q. And you picked Jimmie up, you arrested him, and put him down the stairs with another officer? A. Yes, sir.

Q. Then when you looked in that room you couldn't see whether they were smoking opium or not, could you? [56]

A. Well, I could see all the smoking opium equipment in there and the pipe.

The Court: Didn't you say a while ago that you saw one man smoking, lying on the table?

A. That is correct.

Mr. Hannon: He said that, your Honor, but I am trying to show that that is not correct. Answer my question. Will you ask it, please.

(The last question propounded by counsel for the defendant was thereupon read.)

A. I could.

Q. You could? A. Yes, sir.

Q. You could see him using the pipe?

(Testimony of Henry L. Giordano.)

A. I could see him using the pipe.

Q. Now, you testified in the preliminary hearing in this case, didn't you, before Commissioner Frazier, on the 30th day of January, 1943?

A. That is right.

Q. Now, at that time you didn't testify that you saw anybody smoking opium. You said you could see the equipment in there and that was all.

A. Well, I also could see the pipe being held to the lamp.

Q. Could you see the man with his lips on the pipe? A. No.

Q. You couldn't see that? [57]

A. No, I could just see the pipe and then I could see the pipe coming from the form of the man towards the lamp.

Q. Then in reality all you did see was the equipment? A. I didn't say that.

Q. I didn't ask you that. I asked you what you saw. You didn't see the man with his mouth on the pipe smoking it, did you? A. No, sir.

Q. What you saw was really the equipment. When you went into the room, are there any living quarters there, any beds for people to sleep on? A. I don't—no, no beds.

Q. Was there any kitchen or place for food to be served? A. Place for food, yes.

Q. Did you notice any reading material there, such as Chinese newspapers?

A. I believe there were newspapers around. I didn't——

(Testimony of Henry L. Giordano.)

Q. (Interrupting) Seemed to be quite a few of them?

A. Didn't notice how many. It didn't seem important at that time.

Q. No, but in your observation you saw everything there,—you would see the newspapers if they were there, wouldn't you?

A. That is correct.

Q. And you did see them? A. Uh-huh.

[58]

Q. Now, you had been observing room 10 there for about how long—

The Court: (Interrupting) Pardon me. We are going to recess soon. I want to clear up one more thing. Did the second man come out while Lee was still in the room?

A. The second man was Lee, your Honor.

The Court: Jimmie Wong came first, while Lee was still in there? A. Yes.

The Court: Then Harry Lee came out?

A. No, Jimmie Wong came out, then Harry Lee was directly behind him.

The Court: That is right. I misread the notes.

Mr. Hannon: Would you read me that question.

(The last question propounded by counsel for the defendants was thereupon read, as follows:

"Now, you had been observing room 10 there for about how long——")

Mr. Hannon: (Continuing) ——before James Wong came out? That will complete the question.

(Testimony of Henry L. Giordano.)

A. Oh, I would say several minutes.

Q. Would you say five minutes? Three minutes? A. About five.

Q. About five minutes. A. And then——

Mr. Hedlund: (Interrupting) Go ahead. What was that? [59] A. That is all right.

Mr. Hannon: Q. And then Wong Suey came out—I mean Harry Lee came out, and Wong Suey followed Harry Lee? A. Yes, sir.

Q. Now, how was Wong Suey dressed?

A. Had on an overcoat and hat.

Q. He was fully dressed for the street?

A. Yes, sir.

Q. And you placed him under arrest?

A. Yes, sir.

Q. And did you then go into the room? Did you take Harry Lee and go back into the room?

A. Yes, sir.

Q. What was the reason Harry Lee came out, out to you again? What was the purpose of that?

A. He came out at that time to advise me that he had purchased opium from Louis Jung.

Q. Did he deliver the opium to you?

A. Not at that time, no, sir.

Q. Did he show it to you? A. No, sir.

Q. You don't know, then, that he had it, except just what he told you?

A. Yes, sir, at that time.

Q. That is all you know, just what he told you? [60]

A. At that time, that is all I know.

The Court: Did he deliver it to you later?

(Testimony of Henry L. Giordano.)

A. It was found on his person by one of the other agents, your Honor, during the search.

Mr. Hannon: Q. Now, then, you accompanied Lee back into the room, did you? A. Yes, sir.

Q. How did you get in?

A. Through the door.

Q. Did Lee again put the coin in the——

A. I placed the coin at the door.

Q. You placed it? A. Yes.

Q. Were you out in front of Lee at that time?

A. No, sir.

Q. Oh, was Lee ahead of you?

A. Lee was right by the door, right in front of the door, and I was standing right next to him where the contact was.

Q. You had to be in front of the door in order to put in the coin to unlock the door?

A. Well, the coin was on the right side of the door, on the paneling, and I stood over there and put the coin, and Harry Lee was standing right in front of the door.

Q. And then did the door instantly open?

A. Just within less than a minute. [61]

Q. And when the door opened where were you situated? Where were you standing at the time that door opened?

A. I was standing right a little bit behind Harry Lee, and to his right.

Q. Why were you behind him?

A. Well, he was directly in front of the door.

Q. Well, what was your purpose in getting behind him? A. To gain entrance.

(Testimony of Henry L. Giordano.)

Q. Well, you had entrance the minute that door opened, didn't you? A. Oh, no.

Q. What did you have to do after you got through that door?

A. Had to go through another door.

Q. Did that door require any unlocking?

A. All the doors required unlocking.

Q. The doors weren't open? A. No, sir.

Q. How did you open the second door?

A. The second door was opened by somebody inside.

Q. Did Harry Lee call out, or anything of that kind? How did they know that Lee was there?

A. Well, somebody looked at him through the peek-hole, I believe. I don't know.

Q. And you were still standing behind Harry Lee? A. Yes, sir. [62]

Q. And that door opened and you and Lee stepped in? A. That is right.

Q. Then you arrested the occupants of the room? A. Yes, sir.

Q. And in that room did you find—whom did you find?

A. In the room, Nee Toy, Louis Jung, and Wong Chin Pung.

Q. Now, Wong Chin Pung, how was he dressed?

A. He had on—well, pants and a sweater vest.

Q. And his hat on? A. No, sir.

Q. And he was not exercising any jurisdiction over the room, was he? A. No, sir.

Q. And you didn't make any examination of the

(Testimony of Henry L. Giordano.)

pipes to determine whether they were hot or cold?

A. Not at that time I didn't no, sir.

Q. You did make an examination later?

A. Yes, sir.

Q. And what did you find the condition?

A. At that time I found the condition—it was quite a while after, and all that was in was the residue of yenshee.

Q. You didn't find the pipes hot at all?

A. No, sir.

Mr. Hannon: That is all. Mr. Collier——

The Court: (Interrupting) We will take it up after lunch [63]

Mr. Collier: All right.

The Court: One-thirty, please.

Mr. Collier: At what time?

The Court: One-thirty.

Mr. Collier: All right.

The Court: Adjourn until one o'clock. One-thirty for you. I have another matter at one o'clock. One-thirty for you.

Mr. Collier: All right.

(Whereupon, at 11:58 o'clock A. M., April 16, 1943, the trial of the above entitled cause was suspended, the Court taking an adjournment until 1:00 o'clock P. M.)

Afternoon Session
1:35 o'clock P. M.

HENRY L. GIORDANO

thereupon resumed the stand as a witness in be-

(Testimony of Henry L. Giordano.)
half of the United States of America and was examined and testified further as follows:

Cross-Examination (Resumed)

(Two objects were thereupon marked for identification as Government's Exhibits 18 and 19.)

Mr. Collier: Q. Mr. Giordano, at the time you went into this room at 218 were there any of the other special agents went in with you? [64]

A. At 318.

Q. I mean 318.

The Court: The room was 210.

A. Ten.

Mr. Collier: Room 10 at 318.

The Court: I thought I was in a hotel for a minute.

A. Not when I went in the first time, no, sir.

Mr. Collier: Q. Well, at the time you observed conditions there as you have outlined on the witness stand, were there any of your fellow officers with you at that time? A. Yes, sir.

Q. Who?

A. Agent Doolittle, Agents Richmond and Smith.

Q. Well, had you already taken the men out—Who made the arrest? Did you take them outside and turn them over to the other officers?

A. The men that were in the room?

Q. Yes. A. No, sir.

Q. They were kept in the room and the other

(Testimony of Henry L. Giordano.)

officers came in. Now, you saw Ming Toy here, didn't you? A. Nee Toy?

Q. Nee Toy. A. Yes, sir.

Q. Where was he when you went in the room?

A. He was standing by the bunk on the left-hand side of the [65] room.

Q. Wasn't he standing by a chair on the left-hand side of the room? A. No, sir.

Q. Were there any chairs on the left-hand side of the room?

A. There was a stool behind the desk on the left-hand side of the room.

Q. Well, were there any chairs on the side of the room? A. No, sir.

Q. Or stools or places to sit? What?

A. Just the stool that was behind the desk.

Q. And how was he dressed?

A. He had on a plaid jacket and slacks.

Q. Are you sure he had on slacks?

A. Well, I wouldn't say they were slacks. They were——

Q. (Interrupting) Just had on an ordinary pair of trousers, is that correct?

A. Trousers, that is correct.

Q. You didn't notice that he was exercising any supervision over the place at all?

A. No, sir.

Q. And he wasn't smoking? A. No, sir.

Q. Did you later find out who he was and what he was doing? A. Yes, sir. [66]

(Testimony of Henry L. Giordano.)

Q. You found out that he was a cook here, did you not? A. Yes, sir.

Q. That he had cooked for the Good Samaritan Hospital for approximately ten years?

A. No, I didn't find that out.

Q. Well, you know he cooked for the Good Samaritan Hospital, don't you? A. No, sir.

Q. Didn't you ask him about that?

A. He told us where he was working at the present time.

Q. Told you that he was working out here at the Canton, out on 82nd? A. That is correct.

Q. And that cooking had been his occupation all his life, or since he had been in the United States? You found that out, didn't you?

A. No, the only question I asked him was where he was working at that time.

Q. Well, the main thing I am interested in, you didn't find out that he was connected with this place in any way, shape or form, either as manager or anything else, did you? A. We did.

Q. What?

A. Well, he told us, I believe it was the following day, that he would go up there to smoke. [67]

Q. Told you that he had been up there to smoke once; that is what he told you, didn't he?

A. He made no distinction as to once or how many times. He just went up there to smoke.

Q. Well, assuming that he went up there to smoke, my question was that you found that he

(Testimony of Henry L. Giordano.)
was not either a manager or owner, or anything of that kind, of that place?

A. He made no admission as to that, no, sir.

Q. Well, and you didn't get it from any other source, did you? A. No, sir.

Q. No. Well, why do you hesitate about that?

A. About what?

Q. Telling what this boy's business was.

A. I didn't hestitate as to what his business was.

Q. What time in the night were you up there, approximately?

A. In connection with going into the——

Q. (Interrupting) Well, what time did you go up,—we will find out that way—if you can't remember?

A. In connection with going into the room 10?

Q. Yes.

A. Is that the time you are referring to?

Q. Yes.

A. Is that the time you are referring to?

Q. Yes.

A. It was about midnight on January 12th.

Q. Now, you told the court awhile ago that you saw some of [68] these men smoking——

The Court: (Interrupting) One.

A. One man.

Mr. Collier: Q. Now, you testified on that same subject when you were before Judge Frazier, did you not? A. Yes, sir.

Q. I will ask you if at that time and place in the presence of Judge Frazier and attorneys and

(Testimony of Henry L. Giordano.)

the respective parties, you were not asked this question and if you did not make the following answer:

"Q. Now, then, what did you observe in between the doors there?

"A. Well, the doors were momentarily opened. I observed a Chinaman lying on what appeared to be a table with a mat. I could observe a smoking room equipment, that is, pipe, lamp, and so forth. When the door opened there was fumes of smoking opium coming out."

Then later on the same—Did you so answer?

A. Yes, sir.

Q. And later on the same, after a few questions had intervened, whether you were familiar with the smell of opium, then the question was:

"Very well, go ahead.

"A. Well, I just stayed right opposite there, and another minute or so elapsed and the door opened—opened again, [69] and this time Harry Lee came out, and I observed, I could see inside again and saw a Chinaman lying on the table and the opium equipment, why, I could smell opium, very strong, and Harry Lee came out and I started to lead him over to Doolittle", and so forth.

Did you so testify there? A. Yes, sir.

Q. And at another place in the same testimony you were asked the question:

"James Wong, on the end."

That is, he was pointing him out in the courtroom, as I remember.

(Testimony of Henry L. Giordano.)

"Now, in connection with the smoking apparatus, what did you find in the way of a set-up there?

"Well, there were three complete opium-smoking sets; there were three bunks, three tables, with a mat upon them. On each table there were a smoking opium set, which consisted of a tray, lamp, pipe bowl, yenshee, yen gow"—whatever that is—"tweezers, and other equipment used for smoking."

That is the testimony you gave before the Commissioner? A. Yes, sir.

Q. Not a word stated at that time about seeing anybody smoking, was there? A. No.

Q. You saw the equipment, but you didn't see anybody smoking?

A. Well, I explained how I saw the equipment. [70]

Q. Now, just answer my question. The matter was as fresh in your mind at that time as it is now, wasn't it? A. Yes, sir.

Q. And you were asked to describe conditions as you found them inside that room.

A. Yes, sir.

Mr. Collier: And that was your testimony. That is all.

Redirect Examination

By Mr. Hedlund:

Q. Well, now, you wanted to explain your answer. Go ahead.

The Court: It has been explained once. It doesn't need to be explained any more.

(Testimony of Henry L. Giordano.)

Mr. Hedlund: Very well. Now, I ask that this be marked for identification and handed to the witness.

The Court: As you go by show it to Mr. Collier and Mr. Hannon.

Mr. Hedlund: Have it marked for identification, Mr. Bailiff, please.

(The document referred to was thereupon marked for identification as Government's Exhibit 20.)

Mr. Hedlund: Q. Mr. Giordano, did you have occasion at a later time, after Nee Toy's arrest, to talk to him about the matter?

A. Yes, sir.

Q. Did you take a signed statement from him? [71]

A. Yes.

Q. You have been handed Government's Exhibit 20. I will ask you if that is the signed statement that he gave you? A. It is.

Mr. Hedlund: We offer it in evidence.

Mr. Collier: It would not be admissible at this time, if your Honor please. I—oh, I don't care anything about it.

The Court: It will be admitted.

(The statement referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 20.)

Mr. Hedlund: Q. Now, Mr. Giordano, let me get this in my mind. As I understand it, you say

(Testimony of Henry L. Giordano.)

that when you walked into the room you walked through the door. A. Yes, sir.

Q. And then to the left, over that way, was the first bunk? A. Yes, sir.

Q. And then over to the corner was this desk where Jung was? A. Yes, sir.

Q. And when you first went into the room Nee Toy was standing by that first left-hand bunk?

A. Yes, sir.

Q. Could you see that from out in the hall?

A. No, sir. [72]

Q. The bunk you are referring to was to the left of the doorway, but straight across?

A. Yes, sir.

Mr. Hannon: Suppose you let the witness testify about it. You have been doing all the testifying.

The Court: I don't want to hear any more about the arrangement of the room. Do you have any more questions?

Mr. Hedlund: Yes, your Honor, several more. Furthermore, there was a matter on direct examination that I forgot this morning.

The Court: This is direct, now.

Mr. Hedlund: Q. Mr. Giordano, you testified about Exhibits 8 and 9, which are the jars of smoking opium and yenshee which you testified you found in the desk. A. Yes, sir.

Q. What did you do with those subsequently?

A. Those were placed in the custody of Mr. Bangs when he arrived.

(Testimony of Henry L. Giordano.)

Q. And they were in your custody up to that time? A. Yes, sir.

Q. Now, you examined them this morning, did you not? A. Yes, sir.

Q. Are they in the same or substantially the same condition as they were when you turned them over to Mr. Bangs? A. They are. [73]

Q. Harry Lee—from the time that he was given this marked money until he entered room 10 was he ever out of your sight? A. No, sir.

Q. From the time that you went into room 10 until—let me change that a little bit. When did you turn Harry Lee over to somebody else' custody? A. When Mr. Bang's entered room 10.

Q. And you turned him over to Mr. Bangs?

A. Yes, sir.

Q. Was he ever out of your sight until that time after you were in the room?

A. Not after he was in the room, no, sir.

Q. Did he have an opportunity at any time or any place to turn it over to anybody else without you seeing it?

Mr. Hannon: Just a moment. Your Honor we object to that on the ground that it is a conclusion.

The Court: Correct.

Mr. Hedlund: Q. Well, did he transfer anything or pick up anything at any time during the time you were in there?

Mr. Hannon: Same objection, your Honor.

The Court: If he knows, just from what he saw.

Mr. Hedlund: Q. Did you see it?

(Testimony of Henry L. Giordano.)

A. No, sir.

The Court: He said he didn't see it.

Mr. Hedlund: Q. Was he in your sight all the time? [74]

A. Except when he went in the room and came out the first time, he was in my sight all the time.

Q. Did you question any of these defendants after their arrest? A. Yes, sir.

Q. Did any of them claim ownership of any of this stuff? A. No, sir.

Q. What did they say?

A. They all denied ownership and claimed they were just up there.

Q. Just up there.

A. They didn't give any good reason why they were. They didn't have any reason. They just said——

Mr. Hanlon: (Interrupting) That is not in response to the question, your Honor. It is an argument.

Mr. Hedlund: Q. Now, why wasn't Harry Lee searched at that time?

A. Harry Lee wasn't searched at that time because he wanted to protect his identity as an informer while he was in the presence of these defendants.

Q. You were never present when he was searched? A. No, sir.

Q. He was turned over to Mr. Bangs, I think you testified. A. Yes, sir.

Q. Now, were any other persons other than the

(Testimony of Henry L. Giordano.)
five defendants brought into the room, other than narcotic agents? [75] A. Yes, sir.

Q. When?

A. When Wong Suey and Jimmie Wong were brought into the room, there were two other Chinese that were brought into the room at the same time.

Q. Who brought them in?

A. Agent Smith.

Q. You don't know anything about them, do you? A. No, sir.

Q. How were those—well, I think you testified to that.

A. May I correct the last statement, when you asked me about——

Q. (Interrupting) Certainly.

A. I know their names. That is the only—those two that were brought in.

Q. What were their names?

A. One was Tang Yaw Yen and the other was Hong Fong Woo.

Mr. Hedlund: You may cross-examine.

Recross-Examination

By Mr. Hannon:

Q. The reason you didn't search Harry Lee when he came out of the room was because you wanted to protect his identity as a stool-pigeon?

The Court: Informer, he said.

Mr. Hannon: "Informer" is a better word, yes, your Honor. A. Yes, sir. [76]

(Testimony of Henry L. Giordano.)

Mr. Hannon: A dollar-and-a-half word.

The Court: Although the United States Supreme Court uses the word "stool-pigeon" all the time.

Mr. Hannon: Then I am in good company in using it. Is that correct?

A. Yes, sir.

Q. And the fact that you entered the room through Harry Lee and Harry Lee was really your means of getting into the room, the Chinamen saw you coming into the room with Harry Lee, you still think the Chinamen didn't know that Harry Lee was an informer?

A. Well, those were my instructions at the time, so I followed it through.

Q. You knew that when you went into that room with Harry Lee, when you had Harry Lee open the door for you, and when the Chinamen saw Harry Lee, and you followed him in and you made the arrest, you knew that Harry Lee's identity as an informer was disclosed, didn't you?

A. No, I didn't know that.

Q. What did you think the Chinamen would think if you would be standing in there with Harry Lee? That you had got lost in the building?

A. I didn't know what he was going to tell them how he got in there, or how he let me in, or why, so that was a precaution we took, whether it was necessary or unnecessary. [77]

Q. And that is the only reason or excuse you can

(Testimony of Henry L. Giordano.)
give for not searching Harry Lee when he came back out there and told you he had the stuff?

A. When he came back out there wasn't time to search him before we entered.

Q. That is the only reason you have to give why you didn't search him, that you wanted to protect his identity as an informer?

A. That is correct.

Q. You didn't take any stuff off of him at that time, in any way? A. No, sir.

Q. Nothing at all. Now, these other two Chinamen that you brought in there, into the room, in addition to Jimmie Wong and Wong Suey, what was their connection with this matter? What did they have to do with it?

A. Well, you will have to ask the other agent that brought them in what their connection was.

Q. Didn't you know?

A. I don't know of my own knowledge, no, sir. I can repeat what was told to me.

Q. You wouldn't want to repeat what was told to you.

A. I will if you want me to.

Mr. Hannon: No, I don't. That is all.

Mr. Hedlund: That is all, Mr. Giordano, you may be excused. [78]

Oh, excuse me, Mr. Collier.

Mr. Collier: No.

Mr. Hedlund: Thank you. Step down.

(Witness excused.)

Mr. Hedlund: Mr. Doolittle. [79]

STANLEY E. DOOLITTLE

was thereupon produced as a witness in behalf of the United States of America and was examined and testified as follows:

The Clerk: State your full name, please.

A. Stanley E. Doolittle.

(The witness was thereupon duly sworn.)

Direct Examination

Br Mr. Hedlund:

Q. Mr. Doolittle, you are Narcotic Agent in Charge of the Portland office? A. Yes, sir.

Q. And in that connection did you have occasion to make an investigation of the opium traffic here in Portland? A. Yes, sir.

Q. Are you acquainted with the defendants here in the court room? A. Yes, sir.

Q. Can you identify them? A. Yes, sir.

Q. Give me the names, all of the names, by which you know them, and identify them as you go along.

A. Beginning on the right is a man I know as Louis Gar Foo or Louis Jung or Louis Shay Jung, Chung Jung Louis, Chung Louis. And the next man over I know as Nee Toy or Toy Nee. The next [80] man, in the center, is known to me as Jimmie Wong or James Wong. The next——

Q. (Interrupting) Do you know him by any other name?

A. No, I don't know him by any other name. The next man over I know as Wong Suey or Suey Wong or Wong Suey Lim. The next man as Wong Pun, Wong Chin Pun, Wong Chin Pung.

(Testimony of Stanley E. Doolittle.)

Q. Is that all? A. Yes.

The Court: Pung, (spelling) P-u-n-g?

A. Pun, or Pung, either one.

The Court: "P", rather than "F'?

A. Yes "P".

The Court: Oh, I read this "P" as an "F" in the indictment. He is indicted as P-u-n-g.

Mr. Hedlund: Now, Mr. Doolittle, on the evening of the 12th or early morning of the 13th did you have occasion to give Government funds to anybody?

A. Yes, on the evening of January 12th, 1942, in the city of Portland, Oregon.

Q. And to whom did you give money?

A. I gave fifty dollars to Harry Lee.

Q. Now, did you take the serial numbers off of the bills that you gave him?

A. Yes, sir. I did.

Q. Will you please give us the numbers of those bills and tell us [81] the denominations of the bills.

A. I have a list, which was prepared at the time that I gave them to him, containing the denominations and the numbers.

Q. Just give it to us.

A. A twenty-dollar bill, L-14175818 A.

The Court: Too fast. Wait a minute; slow, so Mr. Hannon can write it down.

A. Twenty-dollar bill L-14175818 A.

Mr. Hannon: —818?

A. —818 A.

Mr. Hannon: Yes.

(Testimony of Stanley E. Doolittle.)

A. Another twenty-dollar bill, L-30473155-A. Ten-dollar bill L-66632801-A.

Mr. Hedlund: Now, after you gave that to him what did he do with it?

A. I, with other Narcotic Agents, followed him to 318 Southwest 2nd Avenue.

Q. And you have heard Mr. Giordano testify?

A. Yes.

Q. Are there any material differences that you might think of in the course of the testimony up to the point where he was up there on the third floor?

The Court: The second—or third floor.

Mr. Hedlund: He went to the third. You stayed on the second floor, didn't you, Mr. Doolittle? [82]

A. No, I said 318 Southwest Second Avenue, not any floor.

Q. All right.

A. Then I followed them up to the—saw them go up to the third floor, Giordano and Lee.

Q. Now, subsequent to that did you ever see that money again? A. Yes, I did.

Q. Where did you see it?

A. In a drawer which was on a desk in Room 10, 318 Southwest Second Avenue.

Mr. Hedlund: Hand the witness Exhibit 15.

The Bailiff: I don't see it.

The Court: Come and find it, Mr. Hedlund.

Mr. Hedlund: Yes.

The Bailiff: Here is 15; I found it.

(Testimony of Stanley E. Doolittle.)

A. This isn't it. This is the miscellaneous money that was found there besides.

Mr. Hedlund: Then I want Exhibit 16, then. What number appears on that, Witness, please?

A. This is 15 here.

Q. All right, then Exhibit 16, if the witness please. Thank you. I want you to look at the contents and tell us if you know what it is?

A. This is the two twenties and ten which I furnished Harry Lee on the night of January 12th, 1943.

Q. And which you subsequently found where?

A. Which I subsequently found in the drawer on the desk in Room [83] 10, 318 Southwest Second Avenue, Portland, Oregon.

Q. Do the same numbers appear on those bills which you read to us awhile ago?

A. The same numbers appear on them.

Q. Now, Mr. Doolittle, will you relate to the Court, as far as you were concerned,—who were you with on the 2nd floor there?

A. Well, I was between the second and third floors on the stairs there, walking back and forth.

Q. Tell us, just briefly, following along, what happened after Harry Lee went on into the opium place?

A. Well, after Harry Lee had gone in someone came up from down stairs who was held by Agent Smith and Agent Richmond. That was Tang Wah Young, and another man appeared who was held by them named Hong Fong Woo. I didn't see just

(Testimony of Stanley E. Doolittle.)
where he came from, but he didn't come out of the third floor; he came from somewhere on the second floor.

Q. All right.

A. Then, shortly thereafter, a man came out of the—out of Room 10, whom Agent Giordano turned over to me and I took him down to the second floor——

Q. (Interrupting) Who was he?

A. Why, it was James Wong.

Q. All right, go ahead.

A. He was turned over to Agents Richmond and Smith, and I went back and stood near the top of the stairs. A few minutes later [84] another man came out, who was stopped by Agent Giordano, and almost immediately another man came out, and the first man was Harry Lee, and the next man was turned over to me by Agent Giordano and I took him down to the second floor, turned him over to Agents Richmond and Smith. He was Wong Suey.

Q. And——

A. (Interrupting) Then Agent Giordano and Harry Lee went through the door of Room 10, the first door, out of my sight, and I watied outside the door for a few minutes, and it was opened by someone on the inside and Agent Richmond and I went into Room 10 and there saw Louis Jung or Gar Foo, Nee Toy, and Wong Chin Pung or Wong Pun.

(Testimony of Stanley E. Doolittle.)

Q. Now, you have heard the arrangements of the room, you are familiar with the room. Is there anything that you would want to amend from what Giordano said about it? A. No.

Q. Did you examine anything on the bunks or tables around the room?

A. Yes, I looked them all over.

Q. What did you find?

A. Well, on each of these three bunks or tables, whichever you call them, there was a complete smoking outfit, consisting of the burning lamp, the burning lamp on each one, a tray, a pipe, opium pipe, bowl, and various accessories like scissors and knives, yen hocks, yen gows. [85]

Q. Hand the witness Exhibit Number 19. Are those some of those that you found there?

A. These are the opium pipe stems which were lying on the various bunks.

Mr. Hedlund: Hand the witness this group of bowls over here. In the meantime, we offer these pipe stems into evidence.

The Court: Admitted.

(The pipe stems referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 19.)

Mr. Hedlund: Q. Will you identify those, please? I believe those are marked number 18.

A. These are opium pipe bowls of yenshee, and every one of which was attached to a corresponding

(Testimony of Stanley E. Doolittle.)
opium pipe stem, and I believe there was a spare one or two left over.

Q. You found yenshee in them?

A. There was yenshee, and a short time after I got in there I felt the pipe bowls which were attached to those stems and two of them were warm.

Q. Which two?

A. I couldn't recall which two from the way in which they are lying here now.

Q. But you do recall that two of them were warm?

A. Two of them were warm and one of them wasn't. [86]

The Court: One of them what?

A. Two of the were warm and one of them wasn't.

The Court: There were three altogether?

A. There were three outfits set up.

Mr. Hedlund: Q. And the rest of them were spares, is that the idea? A. Yes.

Q. Are these the three lamps you refer to?

A. Yes, they are.

Mr. Hedlund: We will offer those bowls in evidence.

(The bowls referred to, so offered, having previously been marked for identification, were thereupon marked received as Government's Exhibit 18.)

Mr. Hedlund: Q. And these persons were kept in custody by you and Giordano, is that right?

(Testimony of Stanley E. Doolittle.)

A. Yes, they were. Giordano and Harry Lee were also in the room. I neglected to mention that.

Q. Now, who else came into the room after that?

A. Well, after Richmond and I had seen who was in the room we went back down to where Agent Smith was and brought up Wong Suey, James Wong, and these other two Chinese, into the room.

Q. Who were these other two Chinese?

A. They were Tan Wah Young and Hong Fong Woo.

Q. Well, I mean, what were they doing there, so far as you know?

A. They just appeared in the building there. So far as we could [87] determine, they had no connection with the——

Q. (Interrupting) What was your purpose of stopping them?

A. To keep them from spreading the alarm.

Q. Now, you and Mr. Giordano and Smith and Richmond left the place, did you?

A. After we had examined the various opium exhibits, and so forth, which were in the drawers, and all the other equipment.

Q. And to whom did you give custody of the place and the persons or prisoners there?

A. When I left District Supervisor Bangs was in charge, Bangs and Burke, I believe.

Mr. Hedlund: You may cross-examine.

Cross-Examination

By Mr. Hannon:

Q. When did you first meet Harry Lee?

(Testimony of Stanley E. Doolittle.)

A. The first time I met him was the night of January 12th, 1943.

Q. Had you ever made any purchase of Harry Lee, of opium from him? A. I have not.

The Court: Take that stuff out of his lap, so it won't bother him.

A. I hadn't, myself.

Mr. Hannon: Q. Had you had any contact with Harry Lee? A. Not myself.

Q. Had you been present when some other agent had contacted him? [88]

A. I had observed those contacts. I hadn't in his immediate presence.

Q. And you had observed Harry Lee selling opium to different Government agents?

A. Only one Government agent, I believe.

Q. And who was that Government agent?

A. Narcotic Agent Giordano.

Q. On how many occasions had you observed him selling to Giordano?

A. I don't recall on just exactly how many occasions.

Q. Did you know at that time that Giordano was employing him as his informer?

A. He was not employing him as an informer when he was buying from him, no.

Q. Well, now, on the 12th day of January, he was buying from him at that time, wasn't he?

A. Yes.

Q. And you arrested him? A. Yes.

Q. Did you talk to him any before he went down to 318 with you?

(Testimony of Stanley E. Doolittle.)

A. Yes, we took him over to the Customs House, where we talked to him and he talked to us.

Q. And you made the arrest? You were the officer in charge, weren't you?

A. At that time District Supervisor Bangs was in charge of the [89] whole thing.

Q. Was Bangs present when the arrest was made, or were you?

A. No, I was there when the arrest was made and he was not, but he was present afterwards.

Q. Who else was there?

A. Well, Agent Giordano had just made the buy. He was there and I was there.

Q. And you stepped up and you said, "You are under arrest, Harry"? A. Yes.

Q. What conversation did you have with Harry at that time?

A. Before we could start any conversation he started talking to us.

Q. Now, that arrest of Harry Lee that night had been pre-arranged by yourself and your other agents, isn't that right?

A. It had been tentatively arranged if the deal went through.

Q. That you were going to make that arrest?

A. Yes.

Q. And on other occasions when Harry would be selling to Giordano there was no arrest made?

A. No.

Q. You just merely observed, is that correct?

A. Yes.

(Testimony of Stanley E. Doolittle.)

Q. You took Harry to the Custom House?

A. Yes.

Q. Why didn't you take him up to the County Jail? [90]

A. It was our desire to take him to the Custom House.

Q. Yes. For what? A. To talk to him.

Q. And you wanted to talk to him for the purpose and with the idea of getting his supply?

A. Well, we didn't know at the time just what was going to happen.

Q. Well, that was your purpose, wasn't it, in part?

A. Well, there had been arranged for that evening a series of arrests and the arrangement was to bring whoever was arrested to the Custom House.

Q. You did talk to him about where his supply was coming from? A. He told us.

Q. Yes; but you asked him about it?

A. Not until he opened the conversation.

Q. But after he opened the conversation you went into it with him and asked him questions concerning it? A. Yes.

Q. And you made the suggestion that he take you down to 318?

A. No. He said that he could make a buy down there, and we didn't know whether he could or not, and it was our purpose when we went down there to make a purchase of opium if possible and we went there with that idea in mind.

(Testimony of Stanley E. Doolittle.)

Q. Now, after you had had him arrested, had him in your custody,—— [91]

A. (Interrupting) Yes.

Q. (Continuing) ——was there anything said or any offer made by you that you would show him some consideration if he would assist you in making a buy of opium? A. Made him no promises.

Q. Well, what did you say to him about it, what you would do for him?

A. Didn't tell him that I would do anything for him.

Q. Well, you made some kind of an offer or an inducement for him to go down and act as your informer, didn't you?

A. Well, we didn't know what was going to happen when we went down there.

Q. No, just answer the question. Will you read it to him?

A. I didn't make him any inducement.

Q. Did anyone in your presence?

A. Not in my presence.

Q. Now, did you tell him anything about what you could do to him in this case, with the evidence that you had on him for the various sales? Did you tell him what the punishment would be in those cases? A. No, I didn't tell him that.

Q. Did any of the other agents tell him?

A. No, but he indicated that he was aware, as he had already been sent to jail on similar charges before.

Q. You mean he was an ex-convict? [92]

(Testimony of Stanley E. Doolittle.)

A. Yes.

Q. Where is Harry now?

A. I don't know just exactly where he is.

Q. When did you see him last?

A. I saw him in the court room here one day, but I can't recall just what day it was. I believe I saw him here the day of his arraignment.

Q. That was the last time you talked to him?

A. I don't believe I talked to him that day.

Q. And when he spoke up and said he knew what the punishment would be for the evidence you had on him here, what did you say to him then?

A. Well, he didn't speak up and say he knew what the punishment would be, but he——

Q. (Interrupting) Well, what did he say in connection with it? You made a statement here that he expressed an appreciation of the sentence that he would probably get for violating this law, he knew because he had been an ex-convict, had been in for the same offense,—or similar offenses, rather. What did you say when he made that statement to you?

A. I don't recall what I said. I don't——

Q. (Interrupting) Did you enlarge on the situation? Did you enter into a conversation with him about that? A. No.

Q. You didn't say anything, eh? Do you want us to believe that? [93]

A. No, I didn't say that he expressed all that. What I mean to say was that he knew he was an

(Testimony of Stanley E. Doolittle.)

ex-convict, and he did too, therefore, there was no discussion about it.

Q. Now, your statement, your testimony, as I understood you,—I want to be fair with you, Mr. Doolittle—but, as I understood it, that Harry told you that he knew what the punishment would be because he had been in similar trouble before; isn't that correct?

A. I believe I said he indicated he knew.

Q. Well, how did he indicate it? By looks? or by words?

A. Well, just by his actions and looks, I believe.

Q. And what were his looks or actions, that he gave you that indication, that caused you to conclude that he was an ex-convict,—now, you are judging from his looks and his actions here, not by words—that caused you to believe that he knew he was an ex-convict, that he knew what the punishment would be, and that he appreciated the situation and was more or less at your mercy?

A. Well, he had indicated that before.

Q. No, I am asking you what he did that made you know these things you are telling us about here?

A. Well, I couldn't say just exactly what he did, Mr. Hannon.

Q. And you don't recall, is that correct?

A. No.

Q. Now, when did you give Harry Lee this money to make this buy [94] at Second?

(Testimony of Stanley E. Doolittle.)

A. Shortly before midnight, just before we left for the 318 Southwest Second.

Q. Where? A. In the Customs Building.

Q. You were in the Customs Building. Now, you had been there with him from about nine o'clock until about twelve, hadn't you?

A. No; in the interval I had been out on something else.

Q. But he had been held there in custody during that time, hadn't he? A. Yes.

Q. And would you say it was about eleven-thirty you gave him the money?

A. I would say it was a little closer to a quarter to twelve.

Q. Quarter to twelve. What did you tell him to do with it?

A. To attempt to make a buy of opium.

Q. Did you tell him you would pay him for it?

A. No.

Q. Was he to get anything for making that buy for you? A. Nothing was promised him.

Q. No, but was anything stated about how you had treated other boys who had acted as your informers? A. No.

Q. And this was the first time you ever saw Harry Lee, and he was in custody from about nine to twelve o'clock, or there- [95] abouts, and you hadn't been there all the time, and you just handed him out fifty dollars; is that correct?

A. I hadn't been there all the time.

Q. And you handed him the fifty?

(Testimony of Stanley E. Doolittle.)

A. Yes.

Q. To go down and make a buy?

A. He said he would make a buy.

Q. You did give him the fifty? A. Yes.

Q. And told him what it was for? A. Yes.

Q. And did you give him any directions as to what he was to do?

A. Well, he was to accompany Agent Giordano.

Q. Well, he was in your company, too. Weren't you in the party?

A. I was following along.

Q. And you were pretty close to him?

A. I was close, yes.

Q. Now, you went down to 318 Southwest Second, what was your position in the house?

A. Well, I didn't remain standing in any one position. When I was—let's see, when James Wong came out of the place I took him from the third floor down to the second floor and returned.

Q. Did you see him when he came out of the room, Room 10?

A. I didn't recognize him when he came out, no.

Q. I know you didn't recognize him when he came out of there. [96] Did you see Jimmie Wong come out of there? We all knew who Jimmie Wong was. Let's talk about him. Did you see Jimmie Wong come out of Room 10?

A. No, I didn't.

Q. You took him down to the second floor?

A. Yes, sir.

(Testimony of Stanley E. Doolittle.)

Q. Were any other agents there?

A. I left him with Narcotic Agent Richmond and Narcotic Agent Smith.

Q. Then did you see Harry Lee go in the room, into Room 10?

A. I didn't actually see him go in.

Q. That is what I am asking you, what you actually saw. You didn't see him go in. Do you know where Wong Suey came from? Was he from the third floor, or was he——

A. (Interrupting) From the third floor.

Q. From the third floor. Did you see him come out of the room, Room 10?

A. No, not to actually see him come out.

Q. Now, about what time of day or morning was it when you went into Room 10 the first time?

A. It was around 12:15 A.M., January 13, 1943.

Q. Do you know what time Officer Giordano went in?

A. He went in a couple of minutes ahead of me.

Q. Only a couple of minutes ahead of you?

A. Well, I wouldn't say exactly how long it was, but it was [97] only a matter of minutes.

Q. Now, Harry Lee had been in there ahead of all of you, is that right? He was the first one of your gang in Room 10, is that right?

A. Well, as far as I know, he was.

Q. Yes; and you didn't see Giordano go in, did you? A. Yes, I saw Giordano go in.

Q. You saw him go in. Why didn't you go in with him?

(Testimony of Stanley E. Doolittle.)

A. Well, I didn't have any reason, one way or the other, at the time.

Q. Well, you were going into that room, you knew you were going into Room 10, didn't you?

A. Well, I didn't exactly know just what was going to happen at that time.

Q. And you knew that Lee contended that he had already made the buy; is that correct?

A. Well, I didn't hear the conversation as to that. That was between him and Giordano.

Q. Did you know at that time that he had made the buy?—I will ask you that.

A. Through Agent Giordano.

Q. And he told you that before he went into the room with Lee, didn't he? A. Yes.

Q. And you were all going in there for the purpose of making [98] a search and raiding the place, is that correct? A. If we could get in.

Q. Yes. And you saw him go in. Did he go in with Lee, or did he go in first?

A. He went in behind him.

Q. Went in behind Lee. And after you went in there—you went in the room how soon, would you say, after Lee? Ten or fifteen minutes?

A. Well, after Giordano?

Q. Giordano.

A. I went in just a couple of minutes, just long enough for him to do what he described and then open the door.

Q. And he let you in. He knew you were going to follow, did he?

(Testimony of Stanley E. Doolittle.)

A. I believe he assumed that.

Q. Who accompanied you into the room?

A. Narcotic Agent James F. Richmond.

Q. You and Richmond went into the room together. What was Giordano doing in the room when you arrived there?

A. He had Nee Toy, Louis Jung alias Gar Foo, and Wong Chin Pung over to the side there.

Q. Had he made a search of the premises at that time?

A. No, I don't believe he had time to make any exhaustive search.

Q. Did he make an examination of the pipes before you did?

A. I didn't observe whether he did or not.

Q. Now, after you were in the room how soon did you start making [99] the examination of the pipes?

A. Well, first we looked to see who was in there, to get that in mind, or I did, and I looked at these three men so I would remember who they were and——

Q. (Interrupting) Did you get their names?

A. Not right at that minute.

Q. Go ahead.

A. Then I saw all these opium-smoking outfits lying around, took it all in, and looked it over, and I couldn't say just what the sequence was, but somewhere in there I felt of those pipes and saw the lamps burning, and so forth.

(Testimony of Stanley E. Doolittle.)

Q. It was some time after you were in there, however, before you felt the pipes?

A. Well it wasn't any appreciable time. It was just a matter of minutes.

Q. You had no trouble in seeing the pipes? The minute you stepped in the door you could see the pipes? A. That is right.

Q. They were right in front of you?

A. They were spread around there.

Q. One bunk with the pipe on it was right in front of the door? A. Yes.

Q. Did you see that pipe? A. Yes.

Q. You weren't looking for pipes, were you? You were looking [100] for opium?

A. We were looking for whatever we could find in the way of narcotic evidence.

Q. Well, opium would be narcotic evidence.

A. Yes.

Q. And that was your purpose there?

A. The purpose was to find any narcotic evidence.

The Court: How many lamps were burning?

A. Three.

The Court: Why would one be cold, one bowl be cold, and the others warm, if all three lamps were burning?

A. I believe they leave—this is just assumption—they leave the lamps burn rather than put them out, whether someone is smoking or not.

Mr. Hannon: Q. Well, the cool one—why would

(Testimony of Stanley E. Doolittle.)

they let one go out and burn the other two, if they keep the lights going?

A. Because those lamps burn peanut oil, and that is not very expensive; it was no trouble to leave them burn.

Q. But there was one that the light was out in, it was cool, according to your testimony.

A. No, the opium pipe bowl was cool, not the lamps, according to the testimony before.

Q. Then all three lamps were hot; is that what I understand your testimony?

A. They were burning, there was a flame in them,—the lamps, that is. [101]

Q. Now, did you see Jimmie Wong in the room?

A. Saw him in the room after he was brought back in.

Q. Until you brought him into the room is the first time you saw him in the room?

A. That is the first time I saw him in the room.

Q. Was Jimmie dressed and ready for the street?

A. He had on an overcoat.

Q. Have a hat on? A. I believe he did.

Q. And Wong Suey, was that the first time you saw Wong Suey in this room, was when you returned him to it?

A. The first time I saw him in the room.

Q. And Wong Suey was completely dressed for the street? A. Yes.

Q. Now, Wong Chin Pung, was he in the room when you went in? A. Yes.

(Testimony of Stanley E. Doolittle.)

Q. How was he attired?

A. He had on a pair of pants and a vest, I believe.

Q. Was he standing up or was he on this bunk?

A. They were all standing up—these three were standing up when I got in there.

Mr. Hannon: That is all.

Mr. Collier: Q. Had you ever known Nee Toy prior to this time?

A. Not prior to that time. [102]

Q. Well, when you asked him his name he told you his name was Nee Toy, didn't he?

A. Yes.

Q. You don't want the Court to understand that he was trying to give you a name other than his true name, do you?

A. No, but it was—the way I understood it, he was known as Nee Toy or Toy Nee, either one.

Q. Well, he didn't tell you that his name was Toy Nee, did he? He told you his name was Nee Toy, didn't he?

A. Well, the way I understood him to say——

Q. (Interrupting) Now, I am just asking you what he told you. Now, if you know, why, all right; if you don't know, say so.

A. Nee Toy or Toy Nee is what he told me.

Q. Well, did he give you both names?

A. That is the way I got it.

Q. Was he exercising any acts of supervision or ownership in that Room 10?

(Testimony of Stanley E. Doolittle.)

A. He was just in there.

Q. And when you got in he was standing, as I understand,—the officer who had preceded you had them lined up along the wall and they were standing? A. Yes, he had them over to one side.

Q. Well, they were standing over near the wall, were they not?

(There was no audible answer.)

Q. Did you take Nee Toy down to the Custom House? [103] A. I did not.

Q. Well, did you go down there with him?

A. No, I didn't go down there with him, but I saw him there later.

Q. Did you find out his business?

A. He told me that he was cook at the Canton Grille.

Q. Have you ever found any reason to doubt that statement? A. No.

Q. Did he tell you where he cooked before that?

A. I don't recall that he did.

Mr. Collier: That is all.

Redirect Examination

By Mr. Hedlund:

Q. Mr. Doolittle, what was, in general—or recall as much as you can of the conversation that you had with Harry Lee that night. Just go ahead and state what the conversation was. What did he say when he was arrested, and so on?

A. Well, when we first arrested him——

(Testimony of Stanley E. Doolittle.)

Mr. Hannon: (Interrupting) I have no objection to it, but we have covered that two or three times.

Mr. Collier: It was all covered in chief and we cross-examined. Now he wants to come along rehash the statement of Harry Lee. If there is a reason, I have no objection, but if he just wants to take up the time I object to it.

Mr. Hedlund: Go ahead and answer the question, Mr. Doolittle. [104]

Mr. Hannon: Would it be all right if we asked a ruling of the Court on that?

Mr. Hedlund: You didn't object.

The Court: I thought you gentlemen were going to decide it yourselves. You gave every indication of doing so. Do you want me to decide something?

Mr. Hannon: Yes, your Honor.

The Court: You have gone into it, I suppose, because you want to make some claim of entrapment.

Mr. Hannon: Yes, your Honor.

The Court: Go ahead.

Mr. Hedlund: Go ahead and tell your conversation with Harry Lee before when you were going down to the hop joint.

A. When he was arrested he talked to the effect that we didn't want him, that he wasn't the one we wanted, that who we should get were the bosses of the opium joint.

(Testimony of Stanley E. Doolittle.)

Q. Did he name anybody? A. Yes.

Q. Who?

Mr. Hannon: Just a moment. That is not proper, your Honor.

The Court: No.

Mr. Hedlund: How did you rule, your Honor?

The Court: I ruled against you.

Mr. Hedlund: Q. Go ahead, tell what was the conversation.

The Court: Just tell what arrangements you made with him [105] and what he did when he went down there to help you make the arrests.

A. Well, after he was arrested we went over to the Customs Building and the various officers were there——

The Court (Interrupting): It is cumulative.

Mr. Hedlund: Q. Did he offer to do it or did you ask him to do it?

A. He offered to go down there to do it.

Mr. Hedlund: That is all.

The Court: That is all. Step down.

Mr. Hedlund: Just one or two more questions.

The Court: One will be enough.

Mr. Hedlund: All right, I will ask it this way: When James Wong and Wong Suey came out to you did they tell you where they had been?

A. They did.

Q. Where?

A. They said they had just come out of the Room 10.

(Testimony of Stanley E. Doolittle.)

Mr. Hedlund: O.K. Thank you.

Mr. Hannon: No questions.

The Court: Step down. Thank you.

(Witness excused.)

Mr. Hedlund: Mr. Bangs. [106]

ANKER M. BANGS

was thereupon produced as a witness in behalf of the United States of America, and was examined and testified as follows:

The Clerk: Will you state your full name.

A. Anker M. Bangs.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Hedlund:

Q. Your name, please?

A. Anker M. Bangs.

Q. And your position, please?

A. District Supervisor, Bureau of Narcotics.

Q. Stationed where?

A. Seattle, Washington.

Q. And you have charge of the Portland, District, too? A. That is right.

Q. Are you acquainted with the occasion of the arrest of the five defendants in this case?

A. I am.

Q. Are you acquainted with each of the defendants? A. I am.

(Testimony of Anker M. Bangs.)

Q. How long have you known them?

A. Louis Gar Foo, or Louis Jung, I have known two or two and a half years. Nee Toy, I first knew on the night of the—or [107] on the early morning of January 13th. James Wong I have known about but I never knew him personally. Wong Suey I have known for a good year and a half, and Wong Pun I have known about but I never met him until the morning of January 13th.

Q. Now, did you go along on this raid?

A. I did.

Q. And you were present, I take it, when the arrangement was made with Harry Lee?

A. I was.

Q. Now, when you went up to the room did you examine the smoking-opium pipes about which there has been testimony here?

A. That is the first thing I did when I entered the smoking room proper.

Q. Well, how long was it,—would you have any way of knowing how long it was after Giordano first went into the place that you got in?

A. It was less than ten minutes.

Q. Would you say it was more than eight?

A. No, it was probably even less than that, probably about five or six minutes.

Q. Well, what did you find with reference to the pipes?

A. I found all three lamps red hot, that is, good and hot, and two of the pipe stems and the bowls hot.

(Testimony of Anker M. Bangs.)

Q. Can you recall the location——

A. (Interrupting): The third one was tepid, you might call it, [108] or lukewarm.

Q. Lukewarm?

A. Yes. In other words, there was a distinction between the three of them, between the two and the third.

Q. Now, were there any other pipe bowls around there? A. There were some, yes.

Q. And what would you say as to their warmth?

A. They were cold.

Q. Now, tell us where you found the three that were from tepid to warm?

The Court: What is important about that? Why do you want that?

Mr. Hedlund: Well, your Honor, it occurs to me that what they are trying to do is to show that these people were not smoking in the place. We have one person who was lying on the bunk right straight down from the door, and there was one who got up from the bunk to the left.

The Court: What difference does it make whether they were smoking?

Mr. Hedlund: Well, it doesn't make any, I don't suppose, but they are trying to make something out of it. I suppose they are going to contend that this was a club room.

The Court: Do you have admissions from any of these defendants?

Mr. Hedlund: No. [109]

The Court: Is this your last witness?

(Testimony of Anker M. Bangs.)

Mr. Hedlund: No. I have to do a little tracing, and then I have an item there that I want translated.

The Court: You mean the account book?

Mr. Hedlund: Yes.

The Court: What do you mean by "tracing"?

A. Well, I have to establish the chain of the narcotics from Seattle. It will only take a couple of minutes.

The Court: What do you mean by "tracing"?

Mr. Hedlund: Well, Mr. Bangs was the next custodian of all of the evidence.

The Court: Are you going to have Harry Lee testify?

Mr. Hedlund: No.

The Court: Why not?

Mr. Hedlund: Well, after all, he is a defendant in another case and I have never asked him whether he wanted to testify. I didn't think it was necessary. I couldn't force him to testify.

The Court: Now, your substantive case is made out now, isn't it?

Mr. Hedlund: Well, there is one little item, and that is the matter of the account book.

The Court: Yes. Does that connect these five defendants up?

Mr. Hedlund: It connects—just a minute, your Honor. Well, [110] maybe you can tell us, Mr. Bangs,—you have studied that carefully; I haven't had a chance to refresh my memory—what names

(Testimony of Anker M. Bangs.)

of these five defendants appear on that account book?

A. Nee Toy definitely. There is a question as to James Wong.

The Court: Wait a minute. You had better not go into that now. There may be a question as to the admissibility of that. I just want to get my bearings on the case. I like to do that when we do not have a jury, so that we outline things out. You have charged purchase and sale in the indictment, haven't you?

Mr. Hedlund: Concealment, purchase, sale, distribution,—yes, that is right, your Honor.

The Court: Well, now, you have got Gar Foo —that is easier for me to pronounce than the other name—you have got him over behind the desk where the money was.

Mr. Hedlund: Yes, your Honor, and we have got his jacket behind that. And, as to Wong Suey, I am not through with this witness. I have got this box to introduce in evidence.

The Court: Now, wait a minute. Let's go from right to left. We go from Gar Foo to James Wong —no, the other man there, Nee Toy. Now, what do you claim as to the case against him as to sale? Anything?

Mr. Hedlund: No.

The Court: As to purchase?

Mr. Hedlund: As to purchase? [111]

The Court: Now, how?

(Testimony of Anker M. Bangs.)

Mr. Hedlund: First of all, the fact that he was present in the premises where there was a large quantity, some six hundred dollars worth, of smoking opium, various paraphernalia for smoking opium, and he was right near where this pipe and lamp was going, and yenshee in the pipe; and, in addition—let's see with respect to Nee Toy.

The Court: Nee Toy.

Mr. Hedlund: Nee Toy,—his name appears on the account books.

The Court: Well, now, we will get to that later. There may be a question of evidence there.

Mr. Hedlund: All right; and, further, that he has given us a statement of making a purchase.

The Court: All right, you have a statement from him of purchase, an admission. Now, James Wong: Do you have a sale?

Mr. Hedlund: No sale.

The Court: Purchase?

Mr. Hedlund: At least this, your Honor, that in all cases it is a question of concealment under the second—that is under the alternative count.

The Court: I am not talking about the second. I am talking about the purchase and sale.

Mr. Hedlund: It would be a question of purchase.

The Court: All right, what have you got against him? [112]

Mr. Hedlund: The fact that he came out of this place which had a large amount of opium in it, and that he admitted being in there. I must say,

(Testimony of Anker M. Bangs.)

your Honor, that I haven't developed fully what he said afterwards. He gave a tale about the matter. Incidentally, his name also——

The Court (Interrupting): You had better develop it.

Mr. Hedlund: Well, I have to do that. I haven't finished my case.

The Court: Who are you going to develop it by?

Mr. Hedlund: By Mr. Bangs.

The Court: All right, that is what I want to get at. Now, then, the next man, Wong Suey: Are you going to have a statement from him? You remember I asked you right at the outset if you had admissions from each one of them and you said no.

Mr. Hedlund: No.

The Court: Now you say you have an admission from Wong.

Mr. Hedlund: No, there was no admission from Wong. He was simply telling what he was doing in there.

The Court: I think I had better tell you that, as to the purchase, just the fact that somebody was in a place doesn't seem to me to be enough, or came out of there.

Mr. Hedlund: Well, now, your Honor, ——

The Court (Interrupting): You go ahead and produce your case, and I have given you that idea to be thinking over this afternoon and this evening. Suppose you find a man in a saloon, [113]

(Testimony of Anker M. Bangs.)

it doesn't even mean that he has bought a drink yet.

Mr. Hedlund: No, your Honor, I realize that.

The Court: Particularly if he came busting out of the door. Maybe he only had two dollars and six bits after he got in there whereas it cost three dollars to stay.

Mr. Hedlund: Q. The hot pipes, Mr. Bangs, you say there was one that was tepid and two that were warm?

A. Yes.

Q. Can you locate those?

A. No, I can't pick out the two that were real hot.

Q. No, I don't mean the pipes themselves, but the place where you found them.

A. The one directly in front of the door as you came in was hot, and the one to the left-hand side was hot, and the one to the right-hand side was the tepid or lukewarm one.

Q. And that was on the opposite side of the room from the desk? A. That is right.

Mr. Hedlund: Now hand the witness—I guess this is not marked for identification. Should these be separate?

A. No.

Mr. Hedlund: Oh, mark it all as one exhibit, please.

(The keys and lock referred to, so produced, were thereupon marked for identification as Government's Exhibit 21.)

(Testimony of Anker M. Bangs.)

Mr. Hedlund: Hand him that, please. [114]

Q. Tell us, if you know, what that is and where you found it?

A. This bunch of keys were lying on the floor,—that is, I found them on the floor during the period I was there. At the time I found them Louis Jung was in the—on the left-hand side, more or less up against the wall, and Wong Suey was on the right-hand side, and these keys were found close to him.

Q. To Wong Suey?

A. Close to Wong Suey.

Q. All right.

A. I asked Wong Suey first whether they belonged to him. He denied it. I then asked each and every person inside whether it belong to them. No one would admit ownership or claim any knowledge about that. I then tried the keys in the doors and found that one of them unlocked the front door lock.

Q. That is, the outside door?

A. That is right.

Q. And that is the lock that you took off the outside door? A. That is right.

Mr. Hedlund: Now, have this marked for identification, please, and hand it to the witness.

(The object referred to, so produced, was thereupon marked for identification as Government's Exhibit 22.)

Mr. Hedlund: We will introduce that in evidence.

(Testimony of Anker M. Bangs.)

The Court: What? The keys? [115]

Mr. Hedlund: The keys and the lock.

The Court: Admitted.

(Said lock and keys, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 21.)

Mr. Hedlund: Q. Have you examined that?

A. Yes, sir.

Q. Where did you ever see that before?

A. I saw that in Room 10, 318 Southwest 10th —or Southwest Second Avenue, Portland, Oregon.

The Court: What is it?

A. It is a suit of clothes made by the Joy Tailors, Portland, Oregon.

Mr. Hedlund: Q. Now, who does that belong to? A. Belongs to Wong Suey.

Q. How do you know?

A. He claimed ownership of it and he had slips in one pocket showing that he had purchased suits from this tailorshop.

Q. And that was in the room after he left that night? A. Yes, that is right.

Mr. Hedlund: We will offer that in evidence.

The Court: Were there any sleeping accommodations there?

A. No sleeping accommodations.

The Court: Were there—— [116]

A. (Interrupting): No eating, no sitting.

The Court: What?

(Testimony of Anker M. Bangs.)

A. No eating accommodations and no sitting accommodations, except lay down.

The Court: Nothing to cook on?

A. There was a plate, but it didn't appear to have been used for any great extent except for boiling water.

The Court: No cooking utensils?

A. No.

Mr. Hedlund: Q. A heating stove there?

A. There was a burning stove there for heat, for heating the room. There was a gas plate on one side.

Mr. Hedlund: The offer is made, your Honor.

The Court: The suit of clothes is admitted.

(The clothing referred to, so offered and received, having previously been marked for identification, was thereupon marked received as Government's Exhibit 22.)

Mr. Hedlund: Q. Now, when you talked to Jimmie Wong what did he give you as his name?

A. I talked to each and every person inside, questioned them about their names, their reasons for being there. That was over a period of approximately two hours, one at a time. Louis Gar Foo would give me no good reason for being inside. Nee Toy admitted—— [117]

Mr. Hannon (Interrupting): Your Honor, that is not responsive, as to whether their reasons were good or not.

Mr. Hedlund: Q. What did Jimmie Wong say

(Testimony of Anker M. Bangs.)

as to what his name was? That is all I asked you, Mr. Bangs.

A. He said his name was Louis Gong, Louis Gar Foo——

Q. (Interrupting): No, Jimmie Wong.

The Court: What did Jimmie Wong tell you?

A. He first gave me his American name as James Wong.

Mr. Hedlund: Q. All right, what else did he say?

A. I asked him what his Chinese name was and he gave me two or three.

Q. What were they?

A. As I recall, it was Wong Yee Kow or Wong Kee Kow or Wong Ding Kow.

The Court: What is the point of all these names?

Mr. Hedlund: To account for identity, your Honor.

Q. What else?

A. I asked him what he was up there for.

Q. No, what other name? I didn't get the last one. A. Wong Ding Kow.

Q. What did Louis Chung say to you?

A. That his name was——

Q. (Interrupting): No, not as to his name, but just in general.

A. I asked him why he was up there and he offered no explanation for being there. He denied ownership. He denied ownership or [118] any knowledge as to what was going on inside.

(Testimony of Anker M. Bangs.)

Q. What did Jimmie Wong give you for being up there?

A. He said he came up there to collect a bill. I asked him who the person that owed him the bill was, and he made no reply to that. I asked him how much the bill was. "Oh, just a few dollars", he said. I asked him if he had anything to show in the way of paper or documents that anybody owed him any money in those premises. He didnt' show me anything.

Q. Now, after Giordano and Doolittle had all left were you in charge of the place?

A. Until about three o'clock.

Q. Until about three o'clock; and you had the persons in custody all of that time?

A. That is right.

Q. And the evidence which has been introduced here was in your custody at that time?

A. That is right.

Q. To whom did you turn it over?

A. Customs Agent Baile and——

Q. (Interrupting): Was any of it disturbed or changed in any way?

A. Everything was left intact the way it was found and as found.

Q. When, if any, was a search of Harry Lee made?

A. About eight o'clock in the morning.

Q. Did you participate in that search?

A. I did. [119]

Q. What was found on him?

(Testimony of Anker M. Bangs.)

A. As I recall, it was either eight or nine bindles that were shaken out of his shoe.

Mr. Hedlund: Hand the witness Exhibit 11, please.

Q. Now, will you examine that, please, and tell us if you know what that is?

A. That is opium prepared for smoking.

Q. Have you ever seen it before?

A. I have.

Q. Where?

A. O nthe night of—on the morning of January 13, 1943, in Room 10, 318 Southwest Second Avenue, Portland, Oregon.

Q. And tell us the circumstances of how you saw that, how you happened to see it.

A. I saw Harry Lee shake them out of his shoe.

Q. And did you have that in your possession for a while? A. I did.

Q. Until when?

A. Until, about nine-thirty in the morning, I gathered it all together and brought it over to the court house here and placed it in the office vualt.

Q. Now, is that in the same, or substantially in the same, condition as it was at the time that you saw it? A. It is.

Q. Did you ever see any tax stamps either on those bindles or [120] upon any container in which they might have been or from which they might have been taken? A. There were not.

Mr. Hedlund: We offer that exhibit in evidence.

The Court: Admitted.

(Testimony of Anker M. Bangs.)

(The objects referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibit 11.)

Mr. Hedlund: You may cross-examine.

Cross-Examination

By Mr. Hannon:

Q. When did you first see Harry Lee?

A. You are referring to this particular night, now?

Q. No, no.

A. Oh. I first saw him in Seattle,—oh, it is close to three years ago, I think.

Q. Did you have any transactions with him with reference to purchasing opium from him?

A. At that time?

Q. Yes. A. No.

Q. When did you first have any opium transactions with him?

A. Well, how do you mean that question?

Q. Well, when did you first have any dealings with him in [121] opium?

A. Well, you mean personally or——

Q. (Interrupting): No, personally or through an agent; it doesn't make any difference.

A. Well, I knew he was dealing in opium in Seattle.

Q. Did you arrest him?

A. No, he went—he disappeared and located in Portland.

(Testimony of Anker M. Bangs.)

Q. And when did you first meet him in Portland?

A. Personally, I met him about eight-thirty on the night of January 12, 1943, in the Customs House.

Q. You were not with the officers when they arrested him for selling opium? A. I was not.

Q. And did you make any arrangements with him as to going to 318 Southwest Second that night?

A. Well, he criticized me a little bit for arresting him or picking on him, he was only small fry, "Why don't you go and get the big shots, the big fellows, the hop joint down there? It has been running for a long time and that is where I have been getting my stuff." "Well," we said, "what about it?" "Well," he says, "if you let me go I will go down and get you into that place or make a buy for you."

Q. What did he mean by "If you let me go"?

A. He knew that he had sold opium to Narcotic Agent Giordano on several occasions. [122]

Q. And the deal that he offered to make there was that if you left him he would go down and make a buy at 318 for you? A. No.

Q. Well, what did you tell him?

A. I didn't tell him anything.

Q. What did you offer to do?

A. I didn't offer to do anything. I told him I had no authority to turn anybody loose, the best I could do was for him to do what he said he could

(Testimony of Anker M. Bangs.)
do and when the time came that I would tell the United States Attorney about it, that is as far as I could go.

Q. Didn't you go a little stronger than that, Mr. Bangs, too? A. I did not.

Q. Didn't you tell him that you would tell the United States District Attorney what an assistance he had been to you, and that in other cases where he had acted as he was about to act that they had been permitted to go at their liberty?

A. You mean Harry Lee himself?

Q. No, no; didn't you tell Harry Lee that, "Well, I can't turn you loose now, but if you will go down there and make that buy as you say you can I will report it to the District Attorney's office and I know how they have acted in other cases and they will act in this case the same as they have in other cases, and the informers have always been turned loose when they cooperate with us"? Didn't you tell him that, in effect? [123]

A. I did not. He wasn't an informer. He was a defendant.

Q. He was about to become an informer for you, wasn't he?

A. Entirely voluntary. I wasn't asking him to.

Q. No, but he was about to become an informer, and you were dealing with him then to become an informer, weren't you?

A. No, I was not. I wasn't making any deal with him.

(Testimony of Anker M. Bangs.)

Q. And you were telling him that you were taking it up with the District Attorney's office if he would make the kind of a buy that he told you he could make?

A. It was my duty to do that.

Q. I am not asking you about your duty, but you did do that? A. I sure did, yes.

Q. And did you accompany him down to 318 that night. A. No, I did not.

Q. Well, you were in the party there, going along, and he was in the party but he was with another officer, but you were along in close proximity?

A. I followed in another car and waited across the street while he went upstairs for the purpose of making a buy out of this Room 10, or the hop joint, as he called it.

Q. Now, did you go right up to Room 18 (sic)?

A. After the agents came down and told me that the boys had entered the premises and were inside, that they were inside, I then went up with him.

Q. How long after you went up to the first floor did you go up to Room 10?

A. I didn't linger on the first floor. [124]

Q. Well, on the second floor?

A. I didn't linger there. I went straight up. I remained on the street until he came down and got me.

Q. How long did you remain on the street before he came down?

(Testimony of Anker M. Bangs.)

A. Just a very few minutes.

Q. Would you say ten or fifteen minutes?

A. No, less than that.

Q. And then you accompanied Officer Smith to Room 10? A. That is right.

Q. And at that time who were in the room?

A. There was Louis Jung, Nee Toy, James Wong, Wong Suey, Wong Pun, and two more.

Q. What officers were in there?

A. Narcotic Officers, Agent Giordano, Doolittle, Smith, Richmond.

Q. You didn't see Giordano go in there, did you?

A. I did not.

Q. And you don't know how much time he had been in there ahead of you?

A. Well, I can figure from the time that I saw him go through the—up the front stairway until Agent Smith came down and told me they were in there.

Q. That is the only way you can figure?

A. That is right.

Q. From the time that he left you on the street and started for Room 10? [125]

A. That is right.

Q. Now, did you see anybody else examine those pipes there that evening?

A. Oh, they were examined by everybody.

Q. They were examined by all of you?

A. Yes.

Q. Why was it so necessary that all of you had to examine these pipes?

(Testimony of Anker M. Bangs.)

A. For evidence purposes and curiosity.

Q. Curiosity? A. Sure.

Q. And when you make an examination do you turn around and ask somebody else to examine them then? Did you request somebody else to examine those pipes? A. No, I didn't.

Q. And you say the keys were found close to Wong Suey? A. That is right.

Q. And who was the person next to—How far away was Wong Suey from the keys?

A. Oh, two or three feet.

Q. And were there anybody else in closer proximity to the keys than Wong Suey?

A. He was the closest one to the keys.

Q. But there were others there in close proximity to the keys, too, weren't there? [126]

A. That is right.

Q. A small room. Now, the clothes that you found in this room, Government's Exhibit 22, was this suit of clothes in the same box when you found it? A. In the exact same box.

Q. In the exact same box as they are now?

A. No, wait a minute; that string wasn't around there.

Q. No, but the suit was in the box?

A. As I recall it, yes.

Q. Yes, was in the box. Now, Wong Suey had given you several names there. Is that an unusual thing for a Chinaman to have more than one name?

A. Oh, they all have. Not all of them. They have several ways of using the same name.

(Testimony of Anker M. Bangs.)

Q. They have one name when they are single, then when they get married they change their name; then they have an American name; so there wasn't anything unusual about Jimmie Wong having two or three names, was there?

A. Oh, that is the natural thing.

Q. Now, this opium that you found on Harry Lee, Harry Lee is supposed to have made the buy along about twelve o'clock on the morning of January 13th?

A. He specifically requested me to wait until twelve o'clock, because at that time——

Q. (Interrupting) No, no, I am not asking you that. Just [127] answer my question.

Mr. Hedlund: Now, let him answer the question.

Mr. Hannon: Yes, but I am not getting an answer to the question, if your Honor please. Mr. Reporter, will you read my question, please?

(The question referred to was thereupon read.)

Mr. Hannon: You can answer that "Yes" or "No", if that is the time that he is supposed to have made the buy?

A. Well, of course, I wasn't present. I was downstairs. That is what the other officers told me.

Q. And then Harry Lee wasn't searched until eight o'clock next morning for the opium?

A. Well, there was a reason for that.

(Testimony of Anker M. Bangs.)

Q. I am not asking for the reason. I am asking you if that is a fact. You can answer that "Yes" or "No".

A. No, it wouldn't be a fair question, it wouldn't be a fair answer.

Mr. Hannon: I am submitting to your Honor, not to the witness, that the question is a fair question.

Mr. Hedlund: Your Honor, I see no reason why the witness should not be instructed that he can answer "Yes" or "No" and explain, or he can refuse to answer "Yes" or "No" on the basis that the question assumes something that is erroneous.

Mr. Hannon: He has testified already to that effect, your Honor. I want to just verify that I correctly understood him. [128]

The Court: Well, you did. You correctly understood him.

Mr. Hannon: Very well, your Honor. I am satisfied with that. That is all.

Mr. Collier: Q. Were you present, Mr. Bangs, when a statement was taken from Nee Toy?

A. No, I was not.

Q. Did you talk to Nee Toy at all?

A. I did.

Q. Where? A. In the premises.

Q. Did you have any trouble understanding him?

A. No.

Q. And what conversation did you have with him?

A. A general conversation about his name, what

(Testimony of Anker M. Bangs.)

he was doing, what he was up there for. He told me his name was Nee Toy, and after a while he finally admitted that he had been up there and smoking, and that he was a cook.

Q. But not that night? He didn't state to you that he had smoked that night?

A. He did.

Q. Pardon? A. He did.

Q. Didn't he tell you, as a matter of fact, Bangs, that he had just gotten into the room, that he had been up there just a few minutes? [129]

A. He didn't tell me that.

Q. Did he tell that in your presence?

A. No.

Q. Did he not tell you at that time that he had smoked once in that place several months prior to this time? Now, isn't that the truth about it?

A. That was not the conversation between him and I. You are talking about what is in that statement.

Q. No, I am not talking about what is in the statement. I am talking about the conversation that was had with you. A. No.

Q. Didn't he tell you at that time that he had smoked in that place once in his life and that that was some months prior to the date upon which this arrest was made? A. No.

Q. Well, did he tell you when he had smoked?

A. That evening.

Q. And was there any other officer present when he told you that?

(Testimony of Anker M. Bangs.)

A. Burke was in the room.

Q. Was there any other officer in your presence or hearing of that statement?

A. I don't know whether he heard that statement or not, because I questioned him individually; that is, I would get them off to one side.

Q. Well, did you question them while they were all standing up [130] there in a line in the room?

A. No, they were not lined up.

Q. Well, the testimony is, here, that they were lined up alongside—along in the room.

A. Not continuously for the two hours or more that I was up there.

Q. Well, where were they when you went in?

A. Well, I would have difficulty in describing just who was where.

Q. Well, I don't care for that. Were they standing, were they all standing, when you went in?

A. No; one or two were sitting on the platforms.

Q. How long had the other officers been in when you came in? A. A very few minutes.

Q. Well, what do you mean "a very few minutes"? I am not asking you, of course, to measure minutes, but giving us your best recollection of the length of time.

A. I would say seven or eight minutes.

Q. Seven or eight minutes; the other officers had been in seven or eight minutes before you went in?

A. That is right.

Q. And when you went in was Giordano already in there? A. He was.

(Testimony of Anker M. Bangs.)

Q. And had been in there for some seven or eight minutes and had had the Chinamen all lined up and standing up, as I understand it from his testimony.

A. Well, what do you mean by "lined up"? [131]

Q. Well, what would you mean by "lined up"?

A. I would say side by side in a line.

Q. That is what I would understand, and that is what he said. Now, I don't know; I wasn't there.

A. Well, they were not in a line.

Q. Well, they were standing up, he says, to keep them from getting to the stove, as I understand it.

A. That is right.

Q. He says that there was a red hot stove in the room and that he was afraid that they would get away with some evidence.

A. That is right.

Q. And that he had them lined up in the room.

A. Uh-huh.

Q. Now, that is his testimony. Now, were they in that position when you went into the room?

A. When I first entered, yes.

Q. And this was some seven or eight minutes after he had been in there?

A. That is right.

Q. After he went in. You are not contending that there had been any smoking between the time that Giordano went in and the time that you went in, are you? A. No.

Q. Did you see Giordano examine those pipes?

A. No. [132]

(Testimony of Anker M. Bangs.)

Q. You don't know whether it was before or after you came in?

A. Well, it would be his duty to examine them——

Q. (Interrupting) Well, now, do you know whether it was before or after you came in?

A. I assume it was before I came in.

Q. Do you know? I am not asking you assumptions; I am asking you if you know. If you know, why, say so. A. I didn't see him.

Mr. Collier: That is all.

Mr. Hedlund: That is all.

(Witness excused.)

Mr. Collier: Before the Government rests their case, I would like permission, if your Honor please, before the Government rests their case, at a suitable time, to recall Mr. Giordano for a few questions.

The Court: Come back now, Mr. Giordano. [133]

HENRY L. GIORDANO

was thereupon recalled as a witness in behalf of the United States of America and, having previously been duly sworn, was examined and testified further as follows:

Recross-Examination

By Mr. Collier:

Q. You testified about a statement from Nee Toy. A. Yes, sir.

Q. Is this your handwriting?

(Testimony of Henry L. Giordano.)

A. No, sir.

Q. Whose handwriting is it?

A. It is Agent Doolittle's.

Q. He can't write any better than I can. Who asked the questions? A. I believe——

Q. (Interrupting) In other words, did you ask the questions?

A. No, Agent Doolittle, I believe, asked the questions. I may have put one or two questions in there, but he asked most of the questions and took the answers.

Q. Who wrote down the questions? Doolittle?

A. Yes.

Q. And the answers were written by him, also?

A. Yes, sir.

Q. Were you present during the entire examination? A. I was.

Q. And you heard the—Did you have an interpreter there? A. No, sir. [134]

Q. You heard all the questions asked and the answers given? A. I did.

Q. Now, did you hear Nee Toy make any statement that he had smoked in that place that night? By "that night" I mean the 12th of January or the early morning of the 13th.

A. I don't recall him saying that he had smoked that night and named that particular night.

Q. If he had said he had smoked that night you would probably have had it in this statement, wouldn't you?

(Testimony of Henry L. Giordano.)

A. If he had said, "I smoked on January 12th or 13th" it would have been in that statement, yes, sir.

Q. And if he had said or used language from which you could infer that he had smoked on that particular night you would probably have been certain to have it in that statement, wouldn't you?

A. If he had made the statement.

Q. Yes. Now, when he said—when the question was put to him as follows: "Here is a picture of Louis Jung, alias Gar Foo. Is he who you bought opium from?"—Now, what did you have in mind? You had in mind the smoking at that time, didn't you?

A. We had in mind the purchase of opium at that time.

Q. Well, you were questioning him, were you not, about him smoking?

A. We were questioning him on just what the question was, the [135] purchase of opium.

Q. Now, the next question is: "How much did you pay him for the smoke?" Now, it would indicate, would it not, that you had smoking in your mind when you had asked him the question about his buying? A. No, it wouldn't.

Q. Well, why, then, did you ask him, "How much did you pay to smoke?"

A. Because that was a separate question.

Q. And then you repeated in substance the same question about smoking. In other words, your ex-

(Testimony of Henry L. Giordano.)
amination, outside of that one answer, was all confined——

A. (Interrupting) Now, just a moment. I testified previous to this that I didn't compose all the questions.

Q. Well, I know, but you were present and heard all of them.

A. Well, I heard the questions; I can testify as to what I heard, but not to why they were asked.

Q. Was this statement read over to Nee Toy?

A. It was.

Q. By whom?

A. It was read by Agent Doolittle and it was read by myself.

Q. Why did you read it twice? Did you have some trouble understanding him?

A. No, just—that was, I figured in my own mind that for my own satisfaction, after Agent Doolittle read it to him, I [136] read it to him again.

Q. Uh-huh. Now, you are sure that he understood it in the first place, but you took the precaution to read it again? A. That is correct.

Q. So if you had been certain that he understood it the first time you would not have read it the second time?

A. Well, he understood it when he answered the questions. He also understood it the second and the third time when it was read over.

Q. Now, as a matter of fact, your purpose in examining Nee Toy was in an effort to try to get

(Testimony of Henry L. Giordano.)

evidence on Gar Foo—that was your purpose, wasn't it?—in regard to the smoking?

A. Nee Toy wanted to make a statement.

Q. And he, I suppose, said that he wanted to go with you to the Custom House?

A. I think that is an entirely different phase—this was a couple of days later.

Q. When was this statement made?

A. About the 15th of January.

Q. And where was it—where did you get hold of Nee Toy at that time?

A. In the county jail.

Q. He asked you to go down to the Custom House, that he wanted to make a statement?

A. Pardon? [137]

Q. Pardon?

A. What was the question?

Mr. Collier: Read it.

(The question was thereupon read.)

A. He did not.

Q. You took him down to the Custom House, didn't you? A. I did not.

Q. Who took him?

A. Nobody took him.

Q. Well, he was in jail, and he didn't break out, did he?

A. No, he didn't break out.

Q. Who took him down there?

A. Nobody took him.

Q. How did he go? A. He didn't go.

(Testimony of Henry L. Giordano.)

Q. Where was the statement made?

A. At the county jail.

Q. I understood you to say—and if I misunderstood you I want to be corrected—I understood you to say that the statement was at the Custom House.

A. No, if I made that statement it was entirely wrong. I don't recall making that.

Q. I so understood you at that time. If I misunderstood you, I want to be corrected. Was there anyone else present when this statement was made, outside of yourself and Doolittle? [138]

A. That is all.

Mr. Collier: I think that is all.

Mr. Hedlund: You may step down, Mr. Giordano.

(Witness excused.)

The Court: This witness whom you held yesterday at your petition, is he going to appear here?

Mr. Hedlund: Yes, your Honor. I am going to put him on right now.

The Court: I am not asking you to put him on. I just asked you if he was included in the witnesses you expect to call.

Mr. Hedlund: I didn't get a chance to finish. I expect to call Agent Smith, Agent Baile of the Customs Office, Mr. Frank Sue, the witness in question, and Mrs. Mary Fung as an interpreter.

The Court: Is Sue the lessee of the property we have been speaking about?

Mr. Hedlund: Yes, your Honor.

The Court: Did he give bail?

Mr. Hedlund: Bail in the sum of one thousand dollars.

The Court: Was he in custody last night?

Mr. Hedlund: No, your Honor. He was released on bail within an hour after being taken into custody.

The Court: We will take a short recess.

(A short recess was thereupon had, after which proceedings were resumed as follows:) [139]

The Court: Call a witness.

Mr. Hedlund: Call Mr. Baile.

FRANK E. BAILE

was thereupon produced as a witness in behalf of the United States of America and was examined and testified as follows:

The Clerk: Will you state your full name, please? A. Frank E. Baile.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Hedlund:

Q. Mr. Baile, by whom are you employed?

A. U. S. Customs Department.

Q. And in what capacity?

A. As a Customs Patrol Inspector.

Q. And did you have occasion to be at 318 South-

(Testimony of Frank E. Baile.)
west Second, Portland, Oregon, on the early morning of January 13th, 1943? A. I did, yes.

Q. Did you go into Room 10 there?

A. I did.

Q. And at that time did you take custody of certain prisoners and evidence?

A. I did.

Q. And for how long a period did you have that custody? [140]

A. I arrived in the room about 2:30 A.M.,—that was on the morning of the 13th of January——

Q. (Interrupting) Yes.

A. (Continuing) ——and I was with them until they were taken to the Custom House about 9:30 in the morning.

Q. Was anything done to in any way change the condition of any of the evidence or contents of that room?

A. No, sir, not while I was there.

Q. And the persons were kept in your custody during that period of time? A. Yes.

Q. And to whom did you turn over that custody after that? A. To Mr. Bangs.

Mr. Hedlund: You may cross-examine.

Cross-Examination

By Mr. Collier:

Q. I understand you to say that the defendants were taken to the Custom House the next morning, or the evidence?

A. No, the defendants.

(Testimony of Frank E. Baile.)

Q. Were there any statements taken at the Custom House? A. That I don't know.

Q. That was the following day, eh?

A. That was on the 13th, the following day.

Q. That is the hoodoo. How long were they at the Custom House on the 13th? [141]

A. Until approximately 5:30 in the evening.

Q. And from about what time?

A. I would say about 9:30.

Q. Nine-thirty in the morning?

A. Between nine and nine-thirty in the morning.

Q. Between nine and nine-thirty in the morning until five or five-thirty in the afternoon?

A. Yes.

Q. What were they doing down there, do you know? A. That I don't know.

Q. Do you know whether any of the defendants were questioned or not? A. No.

Q. And as to whether Nee Toy was questioned there or not you don't know, as I understand it?

A. No.

Mr. Collier: That is all.

Mr. Hannon: No questions.

Mr. Hedlund: That is all, Mr. Baile, thank you. Step down.

(Witness excused.)

Mr. Hedlund: I will call Mr. Smith. [142]

DONALD R. SMITH

was thereupon produced as a witness in behalf of the United States of America and was examined and testified as follows:

The Clerk: Give your full name.

A. Donald R. Smith.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Hedlund:

Q. Mr. Smith, you are employed by the Narcotics Bureau? A. I am.

Q. As an Agent? A. Yes, sir.

Q. And you attended this raid on the early morning or the late night of January 12-13, 1943?

A. I did.

Q. Where were you during this period of time?

A. From the time we left the Customs House?

Q. No, from the time that you got into the premises there, 318.

A. I was on the second floor, at the head of the stairs.

Q. Did anybody come in? A. They did.

Q. Who was it?

A. Tang Wah Young and Hong Fong Woo.

Q. What did you do with them? [143]

A. I held them there at the head of the stairs.

Q. For what purpose?

A. To prevent their giving the alarm.

Mr. Hedlund: Now hand the witness, please, Exhibits 9, 10 and 11, the opium.

(Testimony of Donald R. Smith.)

Q. Examine those, please, and tell us if you have ever seen them before, if you have? A. I have.

Q. Did you ever have them in your possession?

A. Yes, sir.

Q. When?

A. They were given to me by Agent Doolittle for transmission to the chemist in Seattle.

Q. Did you so transmit them? A. I did.

Q. When was that?

A. They were given to me on the 16th. I delivered them into the custody of the chemist on the 18th of January, 1943.

Q. Are they in the same condition as they were at the time you received them?

A. Well, they were sealed when they were given to me, the envelopes were.

Q. Other than that, they are in the same condition? A. I presume the insides are, yes.

Mr. Hedlund: I ask that the Exhibits 4, 5, 6 and 7 for [144] identification be handed to the witness.

Q. Please examine them, tell us, if you know, what they are, where they came from, and what the occasion was that you obtained them?

A. These exhibits were found in defendant Louis Jung or Gar Foo's room at 327 Southwest Second, across the street from 318 Southwest Second.

Q. You went over there——

A. (Interrupting) About nine or ten o'clock on the morning of the 13th Louis Jung took Agent

(Testimony of Donald R. Smith.)

Richmond and I to his room to search it. These were in his room.

Mr. Hedlund: We introduced all four or those exhibits in evidence.

The Court: What are they?

A. This is a roll of cellophane, a rather heavy roll of cellophane as cellophane goes, of the type used for making these papers which are then used to wrap opium in in bindles.

The Court: Do they have any other use that you know of?

A. I know of no legitimate use for cellophane of that size.

The Court: Opium is wrapped in other things than that, isn't it?

A. Nowadays it is invariably wrapped in cellophane.

The Court: What is the reason for that?

A. Well, for one thing, the paper doesn't absorb any of the opium and they are able to recover the entire amount of it [145] from the the cellophane.

The Court: Would you like to see them, Gentlemen?

Mr. Hannon: I don't. We have examined them already.

Mr. Hedlund: Q. And do you have an opium bowl there?

A. This is a pipe bowl which to all appearances is new and unused.

Q. Now, what are the other ones?

(Testimony of Donald R. Smith.)

A. These are yen gows and yen hocks used in smoking opium.

Q. Do they have anything on them?

A. Yes, one of them apparently has traces of opium upon it.

Mr. Hedlund: Those four we offer in evidence.

The Court: Admitted.

(The objects referred to, so offered and received, having previously been marked for identification, were thereupon marked received as Government's Exhibits 4, 5, 6 and 7.)

Mr. Hedlund: You may cross-examine.

Cross-Examination

By Mr. Collier:

Q. When did you make the examination of Louis Gar Foo's room?

A. I would say between nine and ten a.m. on the morning of January 13, 1943.

Q. And Gar Foo at that time was in the County Jail?

A. Gar Foo was in our presence. In fact, he conducted us to that room. [146]

Q. Well, where did you get them? Was he under arrest? A. He was under arrest.

Q. And had he been in jail prior to that time?

A. No, sir.

Q. He had been in your custody all night?

A. He had not been in my custody, no, sir.

Q. Well, had he been in the custody of any other narcotic agent?

(Testimony of Donald R. Smith.)

A. I understand he was.

Q. Who? A. I couldn't say.

Q. Why? A. Because I wasn't there.

Q. How did you know? A. No, sir. (Sic)

Q. Then on the next morning it was at Louis Gar Foo's invitation that you went down there and searched the room?

A. I understood that he had taken District Supervisor Bangs to his room previously, and when I returned I was instructed——

Q. (Interrupting) I am asking you about the time that you have just testified. You didn't testify anything about Bangs being down there. Was Bangs there at the time you were there?

A. No, sir.

Q. And you went down there somewhere in the neighborhood of nine or ten o'clock on the morning of the 13th? A. That is right. [147]

Q. Who went with you?

A. Agent Richmond and Defendant Louis Jung.

Q. Now, where did you go from? From what point did you leave?

A. From Room 10, 318 Southwest Second.

Q. Had he been in that room all night?

A. I couldn't testify to that.

Q. And you say it was at his invitation that you went over there and searched his room?

A. I didn't say that.

Q. Well, I understood you, on your direct examination, to say that he said something about searching his room.

(Testimony of Donald R. Smith.)

A. I said that District—I didn't say on direct examination. If you want me to explain how I happened to take him over there, I will do so.

Q. I wish you would.

A. District Supervisor Bangs told me that Louis Jung had asked him—or, excuse me, District Supervisor Bangs told me that Louis Jung had taken him voluntarily to his room to search, but that he had not made a complete search and he instructed Agent Richmond and I to take Louis Jung back to his room again on Jung's original invitation and to make a complete and entire search.

Q. But you want the Court to understand that whatever search was made there, whether it was the first, second or third, that the search was instigated at the invitation of Louis [148] Jung or Louis Gar Foo?

A. I am not saying it was made at his instigation. I said it was made with his permission.

Q. Well, didn't you say that he had said to Mr. Bangs he could go and search his room?

A. That was the impression Mr. Bangs conveyed to me.

Q. And, acting upon that, you went over with him the second time?

A. Acting upon Mr. Bangs' instructions.

Q. Yes; and Louis made no objections at that time, did he? A. None whatsoever.

Q. To you searching his room. That is all.—That room is on the west side of Second Street, is it not?

(Testimony of Donald R. Smith.)

A. I am not familiar with my directions in Portland. The address was 327 Southwest Second, on the second floor.

The Court: He said it was across the street from the other place.

Mr. Collier: That is what I want,—across the street from the other place.

A. That is correct.

Q. And up on the—what floor?

A. The second floor.

Mr. Collier: The second floor. I think that is all.

Mr. Hannon: No questions.

Mr. Hedlund: That is all, Mr. Smith, thank you.

(Witness excused.) [149]

Mr. Hedlund: Call Frank Sue. Frank Sue. Now, if your Honor please, Mr. Sue advises me that he would like to have an interpreter present, and I ask at this time that Mrs. Mary Fung step forward as an interpreter.

Mr. Hannon: If your Honor please, may we have the advantage of an interpreter for our information here, Mr. Sun? May he be permitted to appear here at counsel's table?

The Court: Yes.

Mr. Hedlund: If your Honor please, in the meantime, while we are waiting for the Clerk, I think we can save a little time. I talked to defense counsel,—if we would recall Mr. Doolittle we would show that these three articles containing the opium, that is, Exhibits 8, 9 and 10, were in the custody

of Mr. Doolittle from the time of this raid, after it was taken to the U. S. Court House, and were kept in the vault and turned over to Agent Smith thereafter, and I understand that the defense counsel are both willing to stipulate to that.

Mr. Hannon: That is correct, your Honor, as far as I am concerned.

Mr. Collier: Yes, if you say they were.

Mr. Hedlund: That is true.

The Court: Swear the interpreter. [150]

(Mary H. Fung was thereupon sworn as an interpreter.)

FRANK SUE

was thereupon produced as a witness in behalf of the United States of America and, through the interpreter, was duly sworn, and was thereafter, through the interpreter, examined and testified as follows:

Direct Examination

By Mr. Hedlund:

Q. Will you please ask the witness where he resides?

The Court: No, do it—ask all your questions in the first person, or, rather, just as if you were asking the witness, "Where do you reside?"

Mr. Hedlund: Q. Where do you reside?

A. 1959 Southeast Larch.

Q. Larch? A. Larch Avenue.

(Testimony of Frank Sue.)

Q. Portland, Oregon?

A. Portland, Oregon.

Q. Do you have any lease or other arrangement on the premises located at 318 Southwest Second Avenue?

The Interpreter: He answers, "Yes, a lease."

Q. Do you recall going with the Narcotic Agents to that address on an occasion since the 13th of January, 1943, and examining a room on the third floor at that time? A. Yes. [151]

Q. Now, that—Does he recall the——

The Court: (Interrupting) No.

Mr. Hedlund: Q. Do you recall what the number of the room was? A. No, I don't remember.

Q. Was it a room located at the head of the stairs on the third floor? A. Yes.

Q. Right to the left of the head of the stairs?

A. Yes.

Q. To whom was that room rented during the month of December, 1942 and the month of January, 1943?

The Interpreter: His answer is that that man died and Louis Gar Foo brought me some rent money.

Q. When did he bring you rent money?

A. The latter part of December, 1942.

Q. And did Gar Foo owe the money for the portion of the month of January that he used the room?

A. He didn't pay me anything for January.

Q. When was the rent due?

(Testimony of Frank Sue.)

A. He is supposed to pay me in advance every month for the month.

The Court: How much?

Mr. Hedlund: Q. And how much?

A. Five dollars.

Q. And Gar Foo was supposed to pay you in advance for that room [152] in January, 1943?

Mr. Collier: Just a moment; I didn't understand—I don't hear this interpreter very well—I didn't understand that Gar Foo had paid any rent money. She said that the other man died and that Gar Foo had brought him some money.

The Court: For the month of December.

Mr. Hedlund: That is right.

Mr. Collier: Yes, that is right.

The Court: And that Gar Foo hadn't paid him anything for the month of January.

Mr. Collier: Yes.

The Court: And the rent was five dollars a month. You can put your own construction on that. Everybody can put your own construction on that.

Mr. Collier: Yes.

The Court: Now ask him another question.

Mr. Hedlund: Your Honor, I am surprised at the answer that the witness gave originally.

The Court: That is all right, you are surprised, and I am not surprised that you have been surprised, am I?

Mr. Hedlund: No, because I had a little trouble

(Testimony of Frank Sue.)

yesterday. Will you read my last question that was put to the witness, please.

(The last question was thereupon read.)

Mr. Collier: I object to that question because it is assuming [153] something not in evidence.

The Court: On counsel's statement that he has been surprised, he may lead the witness.

Mr. Hedlund: Go ahead and put the question to him.

A. The money he paid me for the latter part of December—in the latter part of December is supposed to be for the January rent.

Mr. Hedlund: That is all.

Mr. Collier: That is all.

Mr. Hannon: That is all.

The Clerk: That is all. Just step down.

(Witness excused.)

Mr. Hedlund: Now, Mrs. Fung, if she will remain, please. She will have to be sworn as a witness. I want to use her as an interpreter on this account book. [154]

MARY H. FUNG

was thereupon produced as a witness in behalf of the United States of America and, having first been duly sworn, was examined and testified as follows:

Direct Examination

Mr. Hedlund: I understand that defense counsel

(Testimony of Mary H. Fung.)

will stipulate as to her qualifications as an interpreter and as a translator.

Mr. Collier: I don't know.

Mr. Hedlund: As to her qualifications. I don't know them all without asking questions.

Mr. Collier: I don't know. Go ahead and ask questions.

Mr. Hedlund: Q. Where were you born, Mrs. Fung?

Mr. Collier: I am not caring about that.

Mr. Hedlund: Q. Mrs. Fung, where were you born? A. Pocatello, Idaho.

Q. And to Chinese parents? A. Yes.

Q. And was Chinese spoken in your home?

A. Yes.

Q. And you went to an American school, too, did you? A. Yes, sir.

Q. Where did you go to school?

A. I went to the Pocatello High School, graduated from there; then I went to the University of Washington and finished with my third year.

Q. And did you have any further training in Chinese? [155]

A. I was in China and I studied there for two years, and I had private tutors from time to time.

Q. And are you able to speak and read and write Chinese? A. Yes.

Q. Proficiently? A. Yes.

Q. Can you translate it into English?

A. Yes.

(Testimony of Mary H. Fung.)

Mr. Hedlund: Hand the witness, please, Exhibit 14.

Q. I will ask you if you have examined that previously? A. Yes, I have.

Q. Where? A. In the Custom House.

Q. And when?

A. February 13th—I mean April 13th.

Q. And have you had occasion to go through and translate all of the writings in and on that envelope? A. Yes, I have.

Q. Now, what does it say on the outside of the envelope?

Mr. Collier: Just a moment. We object to that, if the Court please. He has not sufficiently idenfied——

Mr. Hedlund: (Interrupting) It is in evidence.

Mr. Collier: Just a minute.

Mr. Hedlund: Excuse me.

Mr. Collier: There is no evidence as to whose writing that [156] was, nor connected up with any particular individual, so far, that I have heard, and before it could be binding on any one of these defendants there would have to be some connection shown that it was either written by them or under their direction. There is no evidence so far to that point, and for that reason I object to it.

Mr. Hannon: I am joining in that objection, your Honor, in behalf of my clients.

Mr. Hedlund: Now, if your Honor please, this was found in their possession, in possession, and very close to the approximate place where Louis

(Testimony of Mary H. Fung.)

Jung was standing when the room was entered, and it is in evidence; and, furthermore, it was right in the drawer, found along with the opium, and I see no reason why it is not perfectly competent. It is in evidence presently, and I see no reason, if it is now in evidence, why it should not be translated to the Court.

Mr. Collier: It certainly would not be binding upon these defendants until you can show some connection.

Mr. Hedlund: That is up to the Court, probably, as to what connection it has.

Mr. Collier: Well, there has got to be some foundation laid. The Court is sitting here as a jury as well as a judge, and there has to be some connection shown that would involve these defendants.

The Court: I imagine that there is a question or questions—— [157]

Mr. Collier: (Interrupting) In other words, it would be hearsay, what somebody else says would be purely hearsay, as far as these defendants are concerned.

Mr. Hedlund: Get in your objection.

The Court: Now, gentlemen,——

Mr. Hedlund: Pardon me, sir.

The Court: I imagine there is a question or questions about the final admissibility and, in general, about the place, in the case of the document or its contents. I will hear it now provisionally, and I will hear counsel fully on it before the case is closed. Is this the account book?

(Testimony of Mary H. Fung.)

Mr. Hedlund: This is the account book, your Honor.

The Court: Proceed. Ask the question, or read it again, Mr. Reporter.

Mr. Hedlund: What was on the outside of the envelope? I think I asked.

A. It says, "Enclosed are miscellaneous accounts".

Q. That is written in Chinese? A. Yes.

The Court: What did she say?

(The answer referred to was thereupon read, as follows:

"It says, 'Enclosed are miscellaneous accounts' ".)

The Court: You be sure that everybody down there hears. A. Yes. [158]

The Court: In fairness to everybody down there. She said what, now, Mr. Reporter?

(The answer above referred to was again read.)

Mr. Hedlund: Q. Did you examine each of the sheets in that envelope? A. Yes.

Mr. Hedlund: Hand this to the witness, please.

Q. Did you make up that as a translation of what is contained on the sheets? A. Yes, I did.

Q. And they are true and correct? A. Yes.

Mr. Hedlund: Your Honor, I would like to have that marked as a sub-Exhibit of that exhibit and then offer that in evidence.

The Court: Are there several copies of that?

(Testimony of Mary H. Fung.)

Mr. Hedlund: Well, I had one in my office, but I have lost it. I don't know where it is.

The Court: (To the Bailiff) Mr. Cozad, take that second paper down to Mr. Collier and Mr. Hannon and let them look it over.

Mr. Hedlund: Here is one.

The Court: Well, give each one of them one, then, if you can, conveniently.

Mr. Hedlund: Possibly, your Honor, they would like to see the original, with this translation. [159]

Mr. Hannon: Yes, we would, if your Honor please.

The Court: I will tell you how we can shorten this a little bit, counsel for the Government and defense counsel. That is admitted now without any reservation as against the defendant Gar Foo. I reserve ruling as to its admissibility as against the other four defendants. I will rule before the case is closed. I assume that their names all, or some of them, are on the list. I think the question will have to be canvassed among us as to whether or not A's account book found in his possession naming B as one of his customers is evidence against B in a criminal prosecution. I admit it now against Louis Jung alias Gar Foo.

Mr. Collier: May we have an exception as to the admission against Gar Foo?

The Court: Certainly.

Mr. Collier: Has your Honor examined this sheet?

(Testimony of Mary H. Fung.)

The Court: Does it disclose the names and the amounts of them?

Mr. Collier: No, just the names.

The Court: Go get it for me (to the Bailiff).

Mr. Collier: Now, there's no dollars, or anything of the kind, or for whom or against whom; just set opposite it.

Mr. Hedlund: We haven't got any dollar signs on here.

Mr. Hannon: Got a decimal mark.

Mr. Collier: Got a decimal in front of it, but no dollars and cents. [160]

Mr. Hedlund: Let's bring the witness back on the stand.

The Court: Oh, we are going to bring the witness back. What other point do you wish to make about it?

Mr. Collier: There is nothing on the paper itself to show that it has any connection or is in any manner relevant to this case. They are just assuming that these figures are for narcotics. That is the purpose for which it is introduced. There is nothing in the document itself, at least as translated, that would in any way connect it with this case in any manner, shape or form.

The Court: Well, that is, of course, a question we will have to argue out later. Now, Mrs. Fung, will you come back, now, please. Now continue the questions, Mr. Hedlund.

Mr. Hedlund: Q. Well, I merely wanted to ask

(Testimony of Mary H. Fung.)
how you arrived at these figures in the right-hand column on the typewritten sheet? There are some decimal points on here that the defense counsel has questioned as possibly not making a true translation.

A. Oh, some of these we have the dollar, like on the first page here of bank credit it says Woo Yu $8.50—that is the way they write Chinese figures—and then when they have 8 31 with the plus on it, I mean giving the 10 denomination, that signifies a dollar sign in Chinese. They do it in all commercial invoices.

Mr. Hedlund: All right, you may cross-examine. **[161]**

Cross-Examination

By Mr. Collier:

Q. On some of those items they have the dollar sign? A. That is true.

Q. Do they not? A. Yes.

Q. And if they were carrying the dollar sign through, why wouldn't they carry the sign through? They have used it in different places, I understand.

A. That depends on the individual that is writing it. When it runs for instance, from one dollar to ten dollars, they do carry the dollar sign, but when it is over ten dollars they don't carry the dollar sign because that is understood.

Q. You have no way of telling who wrote that have you? A. No.

Q. That is one thing you can't testify about the Chinese writing?

(Testimony of Mary H. Fung.)

A. A handwriting expert could, but I am not a handwriting expert.

Q. Are those names spelled out there?

A. It is phonetically spelled. You mean on my translation?

Q. No, no, on the original?

A. They are written out in Chinese, yes.

Q. The names?

A. The names of the individuals, yes. [162]

Q. Are the names spelled out on the individuals?

A. In Chinese, yes.

Q. Well, what do you mean?

A. Phonetically.

The Court: She said she has translated phonetically.

Mr. Collier: Oh, I see. All right.

The Court: Then we are to accept that typewritten list that you have made as meaning dollars and cents? You haven't used the dollar sign on the typewritten list. A. No, I haven't.

The Court: But you understood it to mean dollars and cents? A. Yes.

The Court: It didn't have the dollar sign in front of it in this case? A. Yes.

The Court: And that is what it meant in Chinese, the same as in those figures, if the dollar sign is before it? A. Yes.

The Court: Go ahead.

Mr. Hannon: That is all, your Honor.

Mr. Hedlund: That is all. Thank you very much.

(Witness excused.)

Mr. Hedlund: The Government rests.

The Court: Mark the typewritten document there.

(The typewritten translation referred to was there- [163] upon marked received as Government's Exhibit 14-A.)

(Government rests.) [164]

IVAN HAMERLYNCK

was thereupon produced as a witness in behalf of the defendants herein and was examined and testified as follows:

The Clerk: What is your name?

A. Ivan Hamerlynck.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Collier:

Q. Where do you live?

A. 8048 Southeast Main.

Q. How long have you lived in Portland?

A. I was born in Portland.

Q. What is your business?

A. The restaurant business.

Q. How long have you been in the restaurant business? A. About twelve years.

Q. And your place of business is where?

A. 82nd and Division.

Q. Do you know the defendant Nee Toy?

A. Yes, I employ him.

(Testimony of Ivan Hamerlynck)

Q. How long have you known him?

A. Around about two and a half years.

Q. And during that two and a half years has he been employed by you? [165] A. Yes, he has.

Q. In what capacity? A. As chef.

Q. Do you know his general reputation in the community as to being a law abiding citizen?

A. He is good. When he came to me as——

Q. (Interrupting) Just a minute. First you may answer that question "Yes" or "No": Do you know his reputation? A. Yes.

Q. And is his reputation as a law abiding citizen good or bad? A. Good.

Q. Do you know where he worked prior to the time he worked for you?

A. Good Samaritan Hospital, at Crater Lake Lodge, and I believe it was St. Martin's Springs. He was dietitian cook at the Good Samaritan Hospital. I have the recommendation from them.

Mr. Collier: You may cross-examine.

Cross-Examination

By Mr. Hedlund:

Q. Has the defendant ever told you anything about this case?

A. Not until after he was out of it, I asked him the question,—naturally I would question him. He said he was innocent. That is all I could do, because I employed him. It was none of my business.

Mr. Hedlund: That is all.

Mr. Collier: That is all.

(Witness excused.) [166]

The Court: Can't we go on another half hour, considering that tomorrow is Saturday.

Mr. Collier: Take the stand. [167]

NEE TOY,

one of the defendants herein, was thereupon produced as a witness in behalf of the defendants and was examined and testified as follows:

The Clerk: Will you state your name.

A. Nee Toy.

Q. What is your name? A. Nee Toy.

Mr. Collier: Will you tell the reporter your name. A. Nee Toy.

Mr. Collier: Now, can you understand when he administers the oath to you? A. No.

Q. Can't you understand. You try talking with the Court, see if you can't make the Judge understand you. A. Uh-huh.

Mr. Collier: Well, all right, hold up your right hand.

The Clerk: Raise your right hand. You swear the testimony you shall give in this cause will be the truth, the whole truth, and nothing but the truth, so help you God? Do you swear that?

A. Uh-huh.

The Clerk: You do? A. Uh-huh.

Direct Examination

By Mr. Collier:

Q. How old are you, Nee? [168]

A. Forty-six.

Q. How much? A. Forty-six.

(Testimony of Nee Toy.)

Q. And what is your business?

A. Just cooking.

Q. Cook. How long have you been cooking?

A. Oh, mostly nineteen years.

Q. How much? A. Nineteen years.

Q. Nineteen years? A. Yes.

Mr. Hedlund: Would your Honor permit me to come up closer?

Mr. Collier: I, perhaps, should have asked the same.

Q. Did you ever cook at the Good Samaritan Hospital?

A. I been cook for Good Samaritan Hospital nine years.

Q. Cook for the Good Samaritan Hospital nine years. When did you quit the Good Samaritan Hospital, about how many years ago?

A. Oh, about—about eleven years ago.

Q. About eleven years ago; and since you left the Good Samaritan Hospital where have you worked?

A. Oh, been working St. Martin Hot Springs.

Q. St. Martin's Hot Springs? A. Yes.

Q. How long did you work at the—What were you doing at the St. Martin's Hot Springs? [169]

A. Oh, just cooking.

Q. Cooking; and for how long, how many seasons, did you work up there, do you know?

A. I work two seasons, two years.

Q. Two years? A. Yes.

Q. And had you ever cooked any place else?

(Testimony of Nee Toy.)

A. Oh, yes.

Q. Where?

A. Oh, been cook, when I came back, in Hood River.

Q. Talk just a little bit louder.

A. Hood River.

Q. How long did you cook in Hood River?

A. Seven months.

Q. Seven months?

The Court: Years.

Mr. Collier: Q. Did you say seven months or seven years? A. Seven months.

Q. Seven months. That is what I thought. Did you ever cook at Crater Lake?

A. Oh, yes, I been cooking two summers.

Q. You cooked at the Crater Lake National Park for two summers?

A. Two summers, yes.

Q. What is your special line? Are you just an ordinary cook, or what is the fact about that? [170]

A. Just a cook.

Q. After you left the Park up there did you go back to the Springs? A. Yes.

Q. Where are you working now?

A. I work in Canton Grille now.

Q. The Canton Grille? A. Yes.

Q. And who is that run by? Who runs that place? A. That is Ivan Hamerlynck.

Q. That gentleman that was just on the stand?

A. Uh-huh.

Q. How long have you been cooking for him?

(Testimony of Nee Toy.)

A. I been there about two years and a half.

Q. Two years and a half. Have you ever been in any trouble in your life? A. Never.

Q. Have you ever been arrested or convicted of anything in your life? A. No.

Q. Now, you know Gar Foo, don't you?

A. Yes, I have seen him. I know Gar Foo.

Q. And I believe you were in his place on the night the officers made their raid up there and arrested you, sometime in January?

A. Yes, I go there just once, something like that, but—— [171]

Q. (Interrupting) Well, I know. Now, we will get to that later. You were there? You were arrested in that place, were you, that night? Officer arrest you? A. No.

Q. In January? A. No.

Q. You know the month of January you was in that place, wasn't you? A. Yes, I been once.

Q. Now, were you ever in that place before that?

A. No.

Q. Well, you were arrested on the morning of the 13th of January? Do you understand me now? The 13th of January, that is when you were arrested, wasn't it? A. Yes.

Q. What time did you go there that night?

A. Oh, about—I think about 11:45, something like that.

Q. Something like 11:45? A. Yes.

(Testimony of Nee Toy.)

Q. What time did you get through your work? What time did you get through cooking and cleaning up?

A. Well, mostly every day, only on January 12th, a Tuesday, then we close and everybody take and left, a day off, see, and then I go to town. Just I come to town.

Q. But when you are working what time do you quit work? [172]

A. Oh, every day, I don't know,—about two o'clock at night, midnight, four o'clock.

The Court: The 12th was a Tuesday?

Mr. Collier: That is what he said.

The Court: I thought he started to say that was the day off, when they closed.

A. Yes, that is the day off.

Mr. Collier: Q. Was that the day off?

A. Yes, that is the day off.

Q. That was your day off?

A. We close every Tuesday.

Q. Every Tuesday you close. And then, except Tuesday, from two to four? A. Every night.

Q. Now, what time did you go to 318 Second that night?

The Court: He said 11:45.

A. I said 11:45.

Mr. Collier: Q. Oh, I see. Did anybody go with you? A. No, just me alone.

Q. Did you smoke any smoke pipe that night?

A. No, I just go in there and I try and look at a newspaper.

(Testimony of Nee Toy.)

Q. How long had you been there before the officers came in?

A. I think about fifteen minutes, something like that.

Q. About fifteen minutes. Where were you when the officers came in? [173]

A. I was just standing by the wall.

Q. Just standing by the wall? A. Yes.

Q. Mr. Bangs, that man over there with the loud tie on, told me that you told him that you smoked that night.

A. No, I did before, but not that day, not that night.

Q. How many times did you ever smoke up there?

A. Just once, about a month ago.

Q. How long ago? A. About a month ago.

Q. About a month ago; and that, you say, was just once? A. Yes.

Q. Did you ever tell Mr. Bangs that you smoked there on the night you were arrested? A. No.

The Court: He said, "No."

Mr. Collier: Q. Now, did they ask you to make a statement later at the County Jail? You were taken to the County Jail, weren't you?

A. Yes, he took me to the County Jail.

Q. When? That night?

A. No, after two nights.

A. Did you ever buy any opium or sell any opium in your life? A. No.

(Testimony of Nee Toy.)

Q. Did you ever have any connection with [174] the 318 Southwest Second Street?

A. No, never, no.

Q. Did you ever deal in opium or have anything to do with opium in your life? A. No.

Q. Now, tell the Judge about this statement. First, when was it taken, how long after you were arrested? A. Oh, about two days.

Q. About two days after you were arrested; and who was present at that time? Who was there?

A. Oh, I don't know who was there.

Q. Well, did they ask you some questions?

A. Yes.

Q. And did they write down the answers?

A. No, he just write down and told me to sign it.

Q. He just write down and told you to sign it. In his statements here you say—he said, "Here is a picture of Louis Jung alias Gar Foo. Is he who you bought opium from?" Did you ever buy any opium from——

A. (Interrupting) No, just smoke.

Q. Just one smoke?

A. Yes, just one smoke.

Q. Did you understand that he was trying to get you to say that you had bought opium?

A. No, I not understand it. [175]

Q. Well, let me put it this way: Other than taking this smoke that you testified to, do you use opium in any form? A. No.

Q. Had you ever bought any opium from Gar Foo, Louis Gar Foo? A. No.

(Testimony of Nee Toy.)

Q. Now, he asked you how much you paid for the smoke, and did you tell him?

A. Yes, I told him I give three dollars, put three dollars on the table.

Q. Told him you put three dollars on the table?

A. Uh-huh.

Q. Did you tell him at that time that you put three dollars on the table? A. Yes, sir.

Q. How were you dressed that night?

A. Well, just something like that.

Q. Something like——

A. (Interrupting) I hung up my overcoat.

Q. Well, now, wait a minute. Did you have on your undercoat? A. Yes.

Q. Did you have on this coat? A. Uh-huh.

Q. Did you have on an overcoat when you went up there, top coat? Did you have on an overcoat when you went up there?

A. Oh, I forgot that. [176]

Q. Well, now, wait a minute. This was in January. Pretty cold, wasn't it? Didn't you wear an overcoat? A. Yes. Uh-huh.

Q. Overcoat? A. Yes.

Q. And did you have your overcoat on when the officers came in? Did you have it on, or had you hung your coat up? A. On.

Q. Was your overcoat on or off?

A. It was on. Just I put it on, see.

Q. Well, you put it on when you went up there. When the officers came up there did you have your overcoat on or off? A. No, just off.

(Testimony of Nee Toy.)

Q. And how about your coat that you have on now? Did you have a coat on like that?

A. Yes.

Q. One of the witnesses testified that you had on slacks. Did you have on slacks, or did you have on trousers just like you have got on now?

A. No, just like that.

Q. Like what? Trousers like you have got on now? A. Yes.

Mr. Collier: I think you may cross-examine.

Cross-Examination

Mr. Hedlund: May I have Exhibit 17, please. [177]

Q. Did you change your clothes any time that night?

A. Just from—I think just something like that.

Q. I mean, you had the same clothes on all that night, while you were held there at that place, did you not, same clothes?

A. No, just the same as that one. Sometime I change that one and used the other one, I remember that.

Mr. Hedlund: Hand this to the witness, ask him if he sees his likeness in that picture.

The Court: You ask him, Mr. Hedlund. They can't ask him.

Mr. Hedlund: Q. Look at it please. I will ask you if you see your likeness in that picture?

The Court: Are you in that picture, he wants to know? Are you in that picture?

A. Yes, this is mine.

(Testimony of Nee Toy.)

Mr. Hedlund: Q. Are those the clothes you had on that night? A. Uh-huh.

Mr. Hedlund: All right.

Mr. Collier: Let's see that.

Mr. Hedlund: That is all.

Mr. Collier: When you get through with it.

Mr. Hedlund: Wait a minute. That isn't all. Now, what was your purpose in going up to this place that night. A. How?

Q. What did you go up there for?

A. Oh, I just go up and look for, you know, some people, some guy, and newspaper. I am going just going, you know, just [178] to look around for the boys, and look upon a newspaper. They get, you know, lots of Chinese newspaper, come from New York, and I look at that.

The Court: When he finishes, read it.

(The last answer was thereupon read.)

Mr. Hedlund: Q. Didn't you go up there to get some smoking opium?

A. No, not that night.

Q. And how many times have you been in that place before? A. Just once before.

Q. Just once before. Are you well acquainted with Gar Foo? A. No.

Q. Who invited you up there? A. How?

Q. How did you get in there?

A. Oh, I get an old man, an old man, I go there that time and I get an old man over there.

Mr. Hedlund: Would you read it.

(The last answer was thereupon read.)

(Testimony of Nee Toy.)

Q. Who was the old man?

A. Oh, I don't know that man's name.

Q. And had you ever seen Gar Foo before this night?

A. Yes, I seen him before.

Q. Where?

A. Oh, in the town, on the street. [179]

Q. Did he ever tell you that you could come up there any time you wanted to? A. No.

Q. And you say you put three dollars down on the table. When was that.

A. That is for a smoke.

Q. When you went up there to smoke?

A. Yes, just once, a long time ago, about a month ago.

Q. A month ago. You mean a month before you were arrested, or do you mean just a month ago here, in along about March?

A. Yes, before now, a month ago.

Q. Before you were arrested,—that is what you mean, isn't it? Isn't that right? A. Yes.

Q. In other words, it was about a month before you were arrested that you went into this place and smoked. A. Yes.

Q. And that was the time that you say that you put the three dollars down on the table?

A. Uh-huh.

Q. And did anybody give you any opium then?

A. Me got it on the tray, see.

Q. How? *Q.* Me got it on the tray.

Q. Well, who put it there? [180]

(Testimony of Nee Toy.)

A. Oh, I don't know.

Q. No, you didn't see him. Well, who was there at the table when you put the three dollars down?

A. Oh, I never paid attention to that. I just put it. He got the sign three dollars and I put the three dollars down and I seen the pipe bowl on the table.

Q. And you turned your back away so you wouldn't see who took the money or put out the opium, is that right? A. Yes.

Mr. Hannon: I don't understand that question.

Mr. Hedlund: Now, wait a minute; I don't want him to misunderstand any question, so I am going to see if he knows.

Q. What did you do to avoid seeing who put that opium on the tray and who took the three dollars?

A. I don't know who took the money, see, I no saw who take the money.

Q. How about who put the opium on the tray, then, if you remember that?

A. No, I don't remember who is——

Q. (Interrupting) Well, who was there? Was Gar Foo there?

A. Yes, he is there, but I not see him put it.

Q. Wong Suey was there, too, wasn't he?

A. No.

Q. Oh, he wasn't there?

A. He wasn't there. [181]

Q. Was Wong Pun there? A. No.

Q. He wasn't there. Was anybody else there besides Gar Foo?

(Testimony of Nee Toy.)

A. No, I not remember. It is a long time. I not remember.

Q. You don't remember that. How much did you get that night?

A. Just one. I take one smoke and then I go out.

Q. One bindle? One of these little packages, one bindle? A. Yes.

Q. You know what they look like, don't you? Huh? Now, Nee Toy, isn't it a fact that on that night you owed $70.50 to the hop joint there——

Mr. Collier: (Interrupting) What was that amount?

Mr. Hedlund: Seventy dollars and fifty cents—and a new amount of $18? In other words, you owed him about $88.50 for opium about that night, didn't you?

A. No, no, I never owe that.

Q. You had an account there and you owed him about $88.50? A. No.

Q. Just how much was it, then?

A. I never owed him that money.

Q. Well, who did?

A. No, I don't owe that.

Q. Now, St. Martin's Hot Springs, where you cooked, that place is used very frequently for addicts to take the cure, isn't it?

Mr. Collier: I don't think that is proper cross-examination. [182]

Mr. Hedlund: Well, he testified about being there. I think it is proper.

(Testimony of Nee Toy.)

Mr. Collier: I don't think it is.

The Court: I will rule whether it is proper or not. Objection sustained.

Mr. Hedlund: Thank you. That is all.

Redirect Examination

By Mr. Collier:

Q. Nee Toy, how much do you earn a month? How much money you make?

A. Now? Oh, about one hundred and twenty-five a month.

Q. Do you owe anybody any money?

A. No.

Q. At the time you smoked there did you pay for it? A. Yes. Just I smoke once.

Q. Yes. Now, do you owe Gar Foo any money at all for any reason? A. No.

Q. Do you owe any of these defendants, either one of the four of them? Do you owe them any money for any account whatever? Do you owe any of them any money? A. No.

Q. Now, this picture here that they have shown to you, which one is you? Is that your picture (indicating)? A. This is some man.

Q. Well, I know, but is that you lying there? [183]

A. Yes, that is me. He tell me, "Just lie down", see. He told me to lie down and not get up.

Q. Who told you to lie down like that?

A. One of the officers. He told me a long time, it was going to be three or four hour, and he told me to lie down there, going to take a picture.

(Testimony of Nee Toy.)

The Court: Read the answer.

(The answer was thereupon read.)

Mr. Collier: Q. That is, he told you to lay down on this——

The Court: (Interrupting) Lie down.

Mr. Collier: Thank you—told you to lie down on this bunk so that he could take a picture of you, huh? A. Uh-huh.

Q. Who is this other fellow lying on that bunk? Do you know him?

A. Oh, that is Jimmie Wong.

Q. Who told him to lie down on that table?

A. It was this one of the officers, one of the officer men.

Mr. Collier: I think that is all.

Recross-Examination

By Mr. Hedlund:

Q. Just one question: Was anybody else smoking around there that night just before you were arrested? A. No, I never seen them.

Q. You never saw anybody else smoking? [184]

A. No.

Mr. Hedlund: That is all.

Mr. Collier: I think the witness covered this——

The Court: (Interrupting) Oh, yes, he has covered it well.

Mr. Collier: Thank you.

The Court: I think a re-reading of Bret Harte would save us all time tomorrow, if we expect to get any information about it. I think that I ex-

(Testimony of Nee Toy.)

tended examination or cross-examination of Chinese who are interested one way or the other at 328 Southwest Second, if there is anything brought out in examination, cross-examination anyhow, that is helpful in the case, I haven't got it. Maybe it is in the record.

Mr. Collier: Well, I think it is understood that he testified that he had only been there about fifteen minutes before the officers came in. Is that your nearest recollection?

The Court: Yes, and he smoked there once before, and he paid three dollars, but who he paid it to or who gave him the opium he hasn't the slightest idea.

Mr. Collier: That is all.

(Witness excused.)

The Court: Now, tomorrow is Saturday. Do you want to make an effort to get through tomorrow?

Mr. Collier: Much as I hate to work on Saturday, I would like to get through, because I have got a case in the Circuit Court Monday morning.

[185]

The Court: Better start at least at nine o'clock, hadn't we?

Mr. Collier: I wouldn't say "at least". Just make it plain nine.

The Court: All right, nine o'clock.

Mr. Collier: Nine o'clock.

The Court: Yes.

(Whereupon, at 4:52 o'clock P. M., April 16, 1943, the trial of the above entitled cause was suspended, the Court taking an adjournment until 9:00 o'clock A. M., April 17, 1943.) [186]

Saturday, April 17, 1943, the trial of the above entitled cause was resumed as follows:

The Court: Proceed, Mr. Collier.

Mr. Collier: This defendant will have to have an interpreter, your Honor. I have had to have an interpreter all the time to talk to him myself, so I am quite sure we will have to have one.

The Court: Do you want one——

Mr. Hedlund: (Interrupting) May we have her, your Honor, sit right up here, so if there is any correction.

(W. L. Sun was thereupon duly sworn as an interpreter.)

LOUIS JUNG alias GAR FOO,

one of the defendants herein, produced as a witness on behalf of the defendants, and having first through the interpreter been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Collier:

Q. Will you state your name, please?

A. Louis Gar Foo.

(Testimony of Louis Jung alias Gar Foo.)

Q. Have you any other name?

A. Louis Jung.

Q. Where do you live?

A. I live at 329. [187]

Q. How old are you? A. Forty-one years.

Q. Now, how long have you been in the premises known as 318 Southwest Second?

A. Oh, about over six years.

Q. For whom were you working, if anybody?

A. You mean who hired me?

Q. Yes.

A. The person who hired me, I worked in the gambling joint.

Q. What was the person's name who hired you when you were in 318 Southwest Second?

A. You mean where I worked up in the room there?

Q. Yes. A. Louis Jung Fook.

Q. Is he living at this time?

A. He is dead.

Q. When did he die?

A. He died on the 23rd of—No, February 23rd.

Q. Of what year? A. Last year.

Q. After he died who paid the rent on Room 10 at 318 Southwest Second? A. Wong Yee.

Q. Well, did you ever pay any rent on that Room 10?

A. After the death of the old man, Wong Yee told me to pay one [188] month's rent towards the last of December.

Q. And by last December he means December, 1942?

(Testimony of Louis Jung alias Gar Foo.)

A. Yes, towards the last, yes, towards the last of the month.

Q. Now, do you remember the night that you were arrested by the narcotic officers?

A. Yes.

Q. And Nee Toy was in your place that night, wasn't he? A. You ask about Nee?

Q. Yes, Nee Toy.

A. What did you ask me?

The Court: Point him out. Point to him. Point out the man you are asking about.

Mr. Collier: Q. I asked you if Nee Toy, this man here, was he in your place on the night of the arrest? A. Yes, he was there.

Q. Had he made any purchases of any kind from you that night, or from anyone else?

A. Didn't do any buying.

Q. Was Jimmie Wong in your place that night?

A. Who are you asking about?

The Court: You had better point to him. He apparently doesn't know these gentlemen very well.

Mr. Collier: Tell him to look this way, at the man there. A. He was in there.

Q. Did he buy anything from you that night? [189]

A. No.

Q. These other two men—Was Wong Suey in your place that night?

A. No, he wasn't there.

The Court: Ask him that again. Maybe he

(Testimony of Louis Jung alias Gar Foo.)
thought you were asking him if he bought anything from him.

Mr. Collier: Wong Suey, stand up. Was Wong Suey in Room 10 at 318 Southwest Second on the night of the arrest?

A. At the time of the arrest he was arrested outside, and when he was arrested they brought him inside and I saw him there.

Q. Did he, this fellow, buy anything from you that night? A. No.

The Court: (To defendant Wong Suey) Sit down.

Mr. Hannon: (To defendant Wong Suey) Sit down.

Mr. Collier: Wong Chin Pung, stand. Do you know this man here? A. I know him.

Q. Did you see him on the night, the morning of the arrest, January 13th last?

A. At the time he was arrested he was talking about some news concerning the Japanese war.

Q. And where was he when he was talking?

A. He was inside, sitting on a bed, talking.

Mr. Collier: You may inquire.

The Court: Do you have some direct, Mr. Hannon?

Mr. Hannon: No, your Honor. [190]

Cross-Examination

By Mr. Hedlund:

Q. What time did you go to work that night?

The Court: Tell him to talk slow. I guess you

(Testimony of Louis Jung alias Gar Foo.)
can't stop them when they get started. Mrs. Fung couldn't have heard that. They were both talking low.

Mr. Collier: Tell the witness to speak loud, so that this good brother over here at the table can hear him.

The Court: Read the question.

(The last question was then read.)

A. Shortly after ten o'clock.

Mr. Hedlund: Q. Who was on duty before that? A. What did you say?

Q. Wasn't Wong Suey on duty prior to the time that he came to work?

A. When I went on duty it was Wong Yee that was inside.

Q. Do you mean Jimmie Wong, who was sometimes known as Wong Yee?

A. No, Jimmie Wong is Jimmie Wong and not Wong Yee.

Q. Was Wong Suey there when you came to work?

A. No, he wasn't there. Wong Yee opened up for me to go in and I opened up the door for him to go out.

Q. What time did Wong Suey come up there?

A. I don't know at what time Wong Suey came there. He was arrested outside and brought in.

Q. You mean that Wong Suey was not in there at any time? [191] A. No.

Mr. Hedlund: That is all.

(Testimony of Louis Jung alias Gar Foo.)

Mr. Collier: That is all.

The Court: That is all.

(Witness excused.)

Mr. Hannon: May I have just one second, if your Honor please? We have nothing to offer, your Honor.

The Court: Rebuttal?

Mr. Hedlund: No rebuttal, your Honor.

The Court: Argument?

Mr. Hedlund: I will waive opening argument.

(Argument was then presented to the Court by the respective counsel.)

The Court: I reserve decision as to Nee Toy, James Wong, Wong Suey and Wong Chin Pung. They may remain at liberty on their present bonds, which will be continued. You may think it is odd to reserve decision as to James Wong in view of the Government's counsel's statements as to that, but I prefer to do that until I read Giordano's testimony.

I find Louis Jung alias Gar Foo guilty on both counts of the indictment, and pre-sentence investigation is directed, and pending the making of the investigation and final disposition of the case the defendant will be remanded to the custody of the Marshal.

(Whereupon proceedings in the trial of the above entitled cause were concluded.) [192]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Cloyd D. Rauch, hereby certify that I reported the oral proceedings had at the trial of the above entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 192, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated this 24th day of May, 1943.

CLOYD D. RAUCH
Reporter.

[Endorsed]: Filed June 11, 1943. [193]

[Endorsed]: No. 10430. United States Circuit Court of Appeals for the Ninth Circuit. Wong Chin Pung, Appellant vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 16, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10430

UNITED STATES OF AMERICA

vs.

WONG SUEY, NEE TOY, WONG CHIN PUNG, JAMES WONG AND LOUIS JUNG, alias GAR FOO,

Defendants,

WONG CHIN PUNG,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

The points on which the Appellant herein intends to rely are the same as those set forth in the Assignment of Errors heretofore filed in this cause, to-wit:

I.

That the Court erred in finding and holding that the defendant, Wong Chin Pung, was guilty under count two of the indictment, for the reason that there were no facts or evidence to support or justify the judgment.

II.

That the Court erred in imposing against the defendant, Wong Chin Pung, any sentence.

III.

That the Court erred in not returning a judgment of acquittal in favor of the defendant, Wong Chin Pung.

Dated this 15th day of July, 1943.

JOHN P. HANNON
LEON W. BEHRMAN
Attorneys for Appellant,
Wong Chin Pung.

State of Oregon
County of Multnomah—ss.

Due service of the within Statement of Points is hereby accepted in Multnomah County, Oregon, this 15th day of July, 1943, by receiving a copy thereof, duly certified to as such by Leon W. Behrman, one of attorneys for defendant and appellant, Wong Chin Pung.

CARL C. DONAUGH
WILLIAM H. HEDLUND
Attorneys for United States
of America.

[Endorsed]: Filed July 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO RECORD ON APPEAL

Reference is made to the Stipulation heretofore entered in this cause on June 11, 1943. This Stipu-

lation heretofore made and entered in this cause is adopted and approved, and

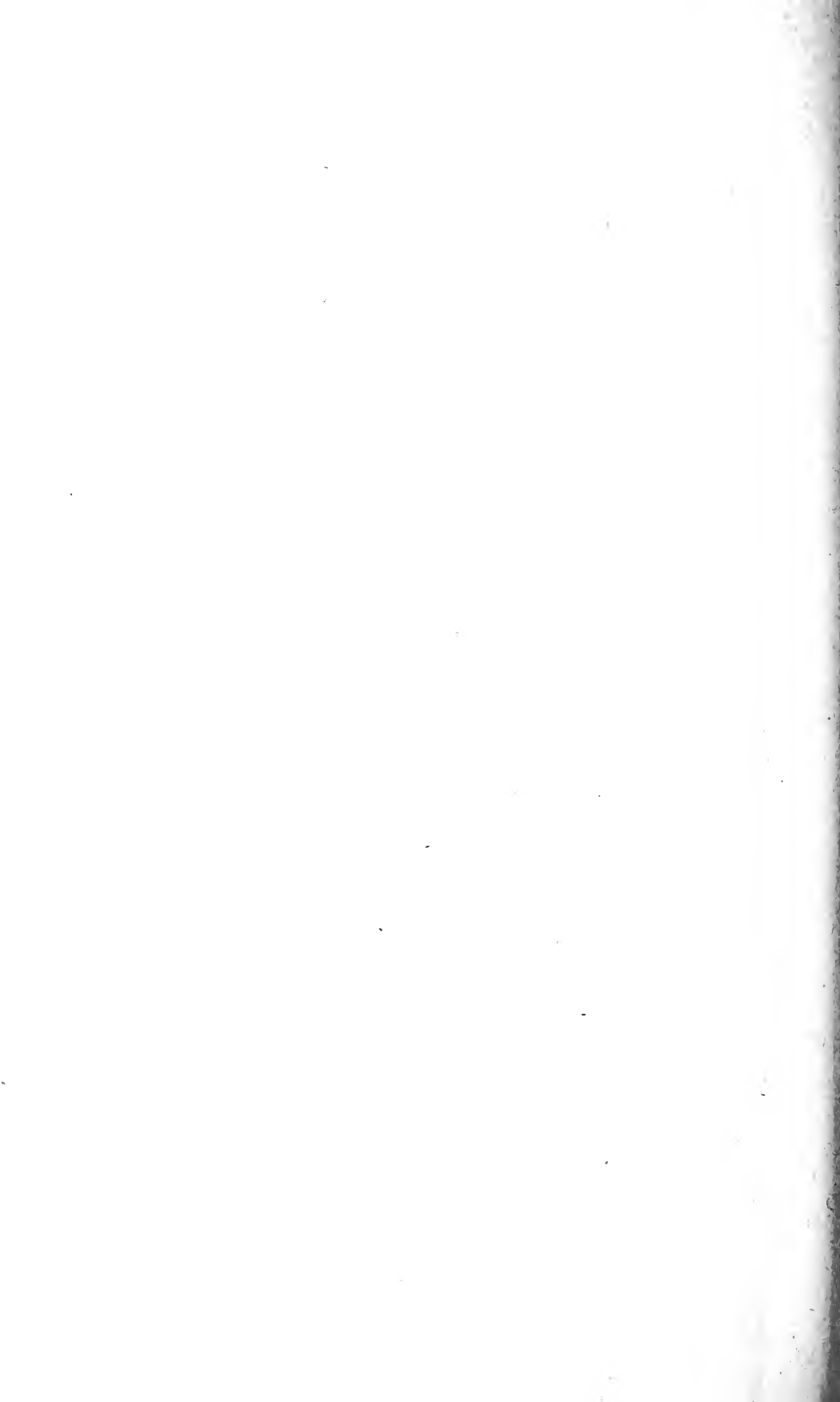
It Is Hereby Stipulated between the United States of America by the United States District Attorney for the District of Oregon and John P. Hannon and Leon W. Behrman, Attorneys for Appellant herein, that the record on appeal to the United States Circuit Court of Appeals, Ninth Circuit, shall contain the following from the record in this cause:

1. Indictment.
2. Plea of Not Guilty.
3. Stipulation for trial by Court without Jury.
4. Finding of the Court and Sentence.
5. Notice of Appeal.
6. All orders extending time for filing Bill of Exceptions.
7. Bill of Exceptions which contains entire transcript of testimony.

CARL C. DONAUGH
United States Attorney for the District of Oregon.
WILLIAM H. HEDLUND
Assistant U. S. Attorney
JOHN P. HANNON
LEON W. BEHRMAN

Portland, Oregon, July 15th, 1943.

[Endorsed]: Filed July 17, 1943. Paul P. O'Brien, Clerk.



No. 10430

In the United States Circuit Court of Appeals

For the Ninth Circuit

2

WONG CHIN PUNG, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appellant's Brief

Upon Appeal from the District Court of the United States for the District of Oregon.

HONORABLE CLAUDE MCCOLLOCH, Judge.

JOHN P. HANNON,
Portland, Oregon,

LEON W. BEHRMAN,
Portland, Oregon,
Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN,
CLERK

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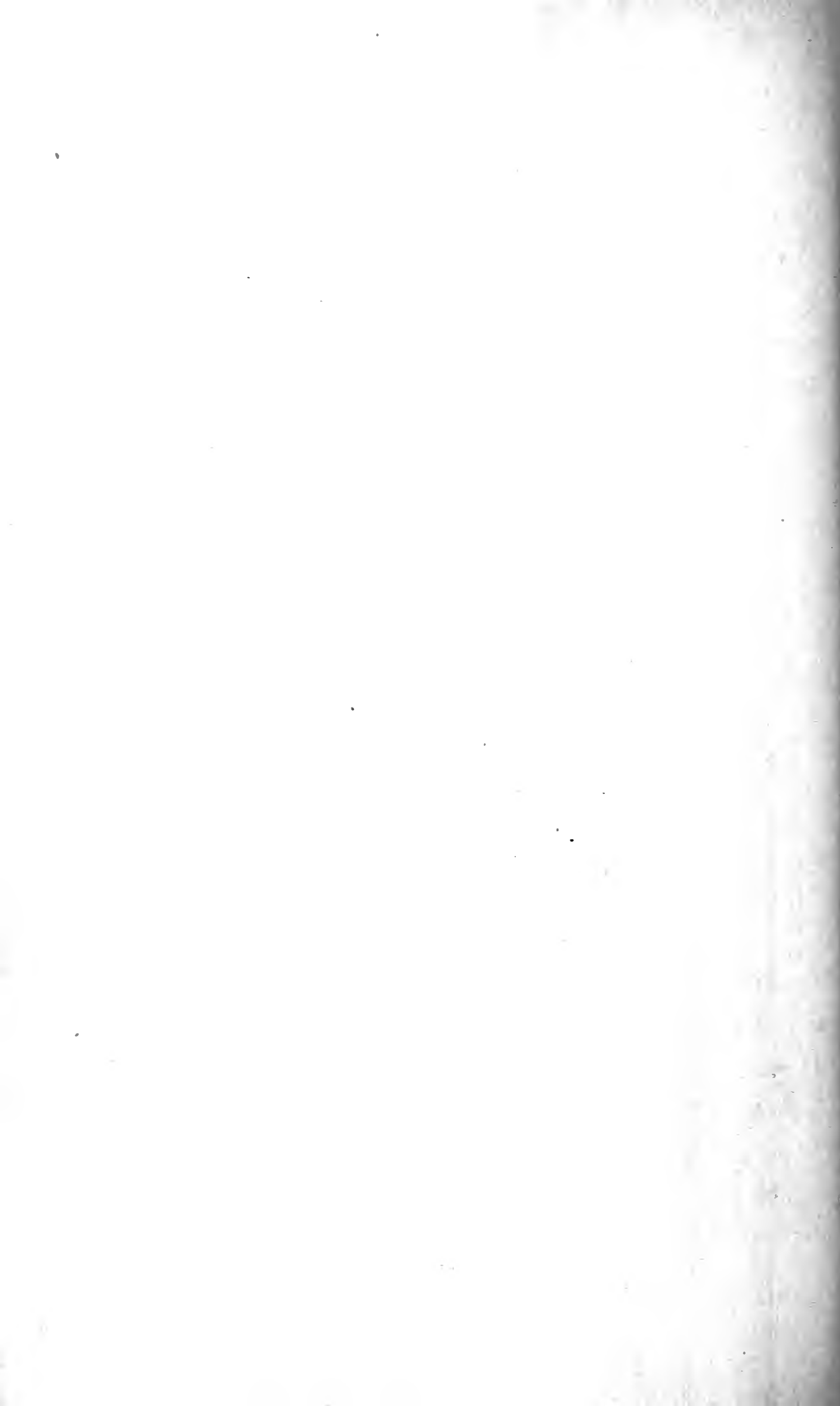

No. 10430

In The United States Circuit Court Of Appeals For The Ninth Circuit

WONG CHIN PUNG, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appellant's Brief

Upon Appeal from the District Court of the United States for the District of Oregon.

HONORABLE CLAUDE McCOLLOCH, Judge.

PRELIMINARY STATEMENT

Appellant, defendant below, and four other Chinamen were indicted under Section 2553, Title 26 U. S. C. A. and Section 174, Title 21 U. S. C. A. on two counts. A jury trial was duly waived. Appellant did not testify at the trial. At the conclusion of the trial, appellant moved the Court for a judgment of dismissal on the ground that the government had failed to submit evidence

sustaining the charges in the indictment. Thereafter the Court found appellant guilty under count two only, of assisting in concealment of smoking opium, to which finding the appellant duly excepted. (Record 17).

There is only one point in the case—does the evidence justify a conviction of the appellant?

JURISDICTION

1. The indictment being under Section 2553, Title 26 U. S. C. A. and Section 174, Title 21 U. S. C. A. (Record 2, 3, 4) the United States District Court for the District of Oregon had original jurisdiction under Sec. 41, Title 28 U. S. C. A. (sub 2) as the indictment charged a crime cognizable under the authority of the United States.

2. (a) This Court has appellate jurisdiction over the District Court of Oregon under Section 211, Title 28 U. S. C. A. placing the District of Oregon in the Ninth Circuit.

(b) This Court has appellate jurisdiction over the District Court in a criminal action by reason of Section 225, Title 28 U. S. C. A. which gives this Court such appellate jurisdiction to review by appeal, final decisions in the District Court, except where direct review may be had in the Supreme Court.

STATEMENT OF FACTS

At 8:00 p. m., January 12, 1943, Federal narcotic agents arrested a Chinaman named Lee in Portland, Oregon. Between that time and midnight they gave him $50.00 in marked money for the purpose of making a purchase of opium. About midnight he took the agents to a room numbered 10 on the third floor, top story, of a building in said city. The premises contained a kitchen, certain furniture, a desk, and a stove which was burning "red hot." There were Chinese newspapers around the place.

When the agents arrived with Lee, James Wong opened the outer door of the room. There was still an inner door, and that door had a round-hole window. Upon the agents entering they saw the appellant and the other defendants. One of them, Louis Jung, alias Gar Foo, was coming from behind a desk and the appellant was standing near the door.

There were three tables in the room, each with a complete smoking outfit, and the lamps were burning. Opium residue was found in the pipes, some of which were warm. No one was smoking or using opium. One agent (Giordano) went over to a desk near which Jung was standing and pulled out a drawer finding opium and $90.00 in money. When questioned by the agents all of the de-

fendants denied ownership of the opium. The agents could not testify that any one was under the influence of opium. There were several coats on the wall in back of the desk from which drawer was opened. There was also a jacket on the wall which Jung claimed was his. There was a coat hanging on the wall behind the desk, which the appellant was allowed to put on. It matched the pants he was wearing. The marked money which had been given to Lee was found in a drawer and the keys found on Jung's person fitted the lock of this drawer.

Lee had previously told the agents that Jung was the "big boss," but made no reference in any way to the appellant. Jung paid the rental of the premises and they were under his control. He so admitted at the trial. The appellant was not exercising any jurisdiction or control over the premises at any time.

ASSIGNMENT OF ERROR

I.

The Court erred in finding and holding Appellant, Wong Chin Pung, guilty under count two of the indictment, for the reason there were no facts or evidence to support or justify the judgment, and the Court therefore erred in sentencing him and in not returning a judgment of acquittal in his favor. (Record 15, 16.)

ARGUMENT

While in a criminal case the defendant must be found guilty beyond any reasonable doubt, the Supreme Court has determined that the function of this Court is "not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence. competent and substantial, fairly tending to sustain the verdict."

Abrams vs. United States,
250 U. S. 616, 619,
40 S. Ct 17, 18,
63 L. Ed. 1173.

This case was recently cited in *McNabb vs. U. S.* 123 F. (2d), 848, 855.

Therefore, as the defendant did not offer any testimony, if the record contains some competent and substantial evidence this Court should affirm. However, it is our contention that there is no such evidence against the appellant. Appellant was found guilty only of assisting in concealment of smoking opium.

WHAT IS CONCEALMENT?

Concealment is a positive and affirmative wrong.

Conceal:

"To hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of."

Webster's New International Dictionary (2d Ed).

"Conceal has been defined as meaning to cover or keep from sight, to disguise, to dispose of, to fail to disclose, to hide, withdraw or withhold from observation, to prevent the discovery of."

15 Corpus Juris (2d) Page 792

"To conceal means to hide or withdraw from observation, to prevent the discovery of; to withhold knowledge of."

U. S. vs. Bookbinder,
281 F. 207, 210.

"To conceal is to hide, secrete, screen or cover."

Robinson vs. Commonwealth,

268 S. W. 840, 841,
207 Ky 53, 56.

WHAT DOES THE EVIDENCE SHOW?

1. *The government informer did not name appellant as being a dealer in opium, but named other defendants.*

Testimony of agent Giordano (record 62).

"he named Wong Suey and Louis Jung" (Gar Foo) "the big bosses."

2. *Appellant was not smoking opium.*

Testimony of agent Giordano (record 37).

"The Court: Were there people smoking in there?

A. Not when I entered, your Honor."

Testimony of agent Giordano (record 71).

"Q. Could you see the man with his lips on the pipe? A. No.

Q. You couldn't see that?

A. No, I could just see the pipe and then I could see the pipe coming from the form of the man towards the lamp.

Q. Then in reality all you did see was the equipment?

A. I didn't say that.

Q. I didn't ask you that. I asked you what you saw. You didn't see the man with his mouth on the pipe smoking it, did you?

A. No, sir."

Testimony of agent Bangs (record 139).

"Q. After he went in. You are not contending that there had been any smoking between the time that Giordano went in and the time that you went in, are you? A. No."

3. *Appellant was not under the influence of opium.*

Testimony of agent Giordano (record 56, 57).

"The Court: Did any of these defendants show

signs of being under the influence?—Is that the way you speak of it in the trade?

A. The only way you could tell would be the odor of the opium on their breath, and it was so strong in the room that you couldn't tell by that."

4. *Appellant had no opium in his possession.*

The record shows there was no opium in appellant's possession, and the finding of the trial court of not guilty on count one reaffirms this.

5. *Appellant had no keys, locks, or other symbols of actual or constructive possession over the desk where opium was found, and where the marked money given to the informer was located.*

The keys were found on Jung's (Gar Foo) person. The marked money was found in a drawer in a desk.

Testimony of agent Giordano (record 50).

"A. Yes, sir. There were several keys on Louis Jung's person that Agent Richmond tried one of the keys and found that it fitted the lock that was found in this drawer.

Q. And that was found on whose person? A. On Louis Jung's person.

Q. And is that one that is now in the hands of the witness?

A. These are the keys that were found by Agent Richmond on Louis Jung's person in my presence.

Q. And that is attached now to Exhibit 2, that

you found in the drawer? A. Yes, and it works this lock."

6. *Appellant had no actual or constructive possession of the room and wood pile where opium was found.*

The evidence shows that Jung (Gar Foo) was the tenant of the premises and that he paid the rent.

Testimony of Frank Sue (record 157, 158).

"The Interpreter: His answer is that that man died and Louis Gar Foo brought me some rent money.

Q. When did he bring you rent money?

A. The latter part of December, 1942.

Q. And did Gar Foo owe the money for the portion of the month of January that he used the room?

A. He didn't pay me anything for January.

Q. When was the rent due?

A. He is supposed to pay me in advance every month for the month."

Testimony of same witness (record 159).

"A. The money he paid me for the latter part of December—in the latter part of December is supposed to be for the January rent."

7. *Appellant was at no time exercising control over the room where the opium was found.*

Testimony of agent Giordano (record 75).

"Q. Now, Wong Chin Pung, how was he dressed?

A. He had on—well, pants and a sweater vest.

Q. And his hat on? A. No, sir.

Q. And he was not exercising any jurisdiction over the room, was he? A. No, sir."

8. *The Appellant did not operate or control the opening or closing of either the outer or inner door.*

From the evidence it does not appear that appellant had anything to do with the operation of the doors.

9. *Appellant made no admissions against interest, or incriminating statements of any nature.*

Testimony of agent Giordano (record 86).

"Q. Did any of them claim ownership of any of this stuff?

A. No, sir.

Q. What did they say?

A. They all denied ownership and claimed they were just up there."

Statement of Mr. Hedlund, Assistant U. S. Attorney conducting the prosecution (record 117).

"The Court: Do you have admissions from any of these defendants?

Mr. Hedlund: No."

From the above testimony, it can readily be ob-

served that there is not sufficient evidence to justify a conviction of appellant on the charge of assisting in concealment of opium. There is no evidence to show that the appellant aided and abetted Louis Jung to conceal opium, nor is there any evidence that appellant did any affirmative act to assist said Jung or anybody else, to conceal opium. While we have not found a case identical with the one at bar, we desire to quote from the case of *Eng Jung vs. The United States,* 46 F. (2d) 66, where appellant was charged with possession and concealment of opium as follows:

> "(2-4) We think also there is not sufficient evidence to support the verdict of guilty on the first count. The learned court said: 'There is no evidence, I think, which directly shows that the defendant either had on his person or actually in a room which he occupied, any of the narcotics. The allegation is, as I understand it, on the part of the Government, that he was cognizant of the situation and that he had become interested in the possession of the opium and the utensils which were found in his place.'
>
> If it be conceded that defendant was cognizant as to what was going on among his tenants, he was not charged with cognizance of evil doing. If the court treated the first count merely as a count charging unlawful possession, and nothing more, there was no evidence of unlawful possession, unless possession be presumed from the fact that a landlord living in a house, whose rooms are separately leased to numerous tenants, possesses opium. This is too remote a posses-

sion to constitute a crime, as it is equally consistent with innocence.

The evidence shows that the defendant's apartment was separate and distinct from the rooms occupied by the other Chinamen. The raiders found the defendant's door unlocked, entered his room, and made a thorough search of his apartment. There they found a scale on his desk, customarily used in weighing opium, a lease book, showing payments of rent, and certain other papers. This was the whole case against the defendant. No narcotics of any kind were found in his apartment. There was no evidence that any narcotics were in his possession or under his control. The government sought to draw the conclusion that the opium found in the possession of certain tenants was in the possession of the defendant. Aside from the question of possession in fact, it could not be said that there was even constructive possession. Such possession could not be assumed from the facts shown. If it be granted that the facts shown are sufficient to raise a suspicion against the defendant, verdicts in criminal cases cannot rest on suspicion. The sanction of the law requiring proof of guilt, beyond reasonable doubt, intended for the protection of innocence, must be steadily observed.

Being fully of the opinion that the evidence was not sufficient to support a verdict of guilty on either count of the indictment, the judgment is accordingly reversed."

CONCLUSION

It is our belief that this case is clear and easy of solution. We do not think that the government has any competent and substantial evidence tending to connect the appellant in any way with the crime charged in the indictment and we, therefore, believe that the finding of the trial court should be reversed.

Respectfully submitted,

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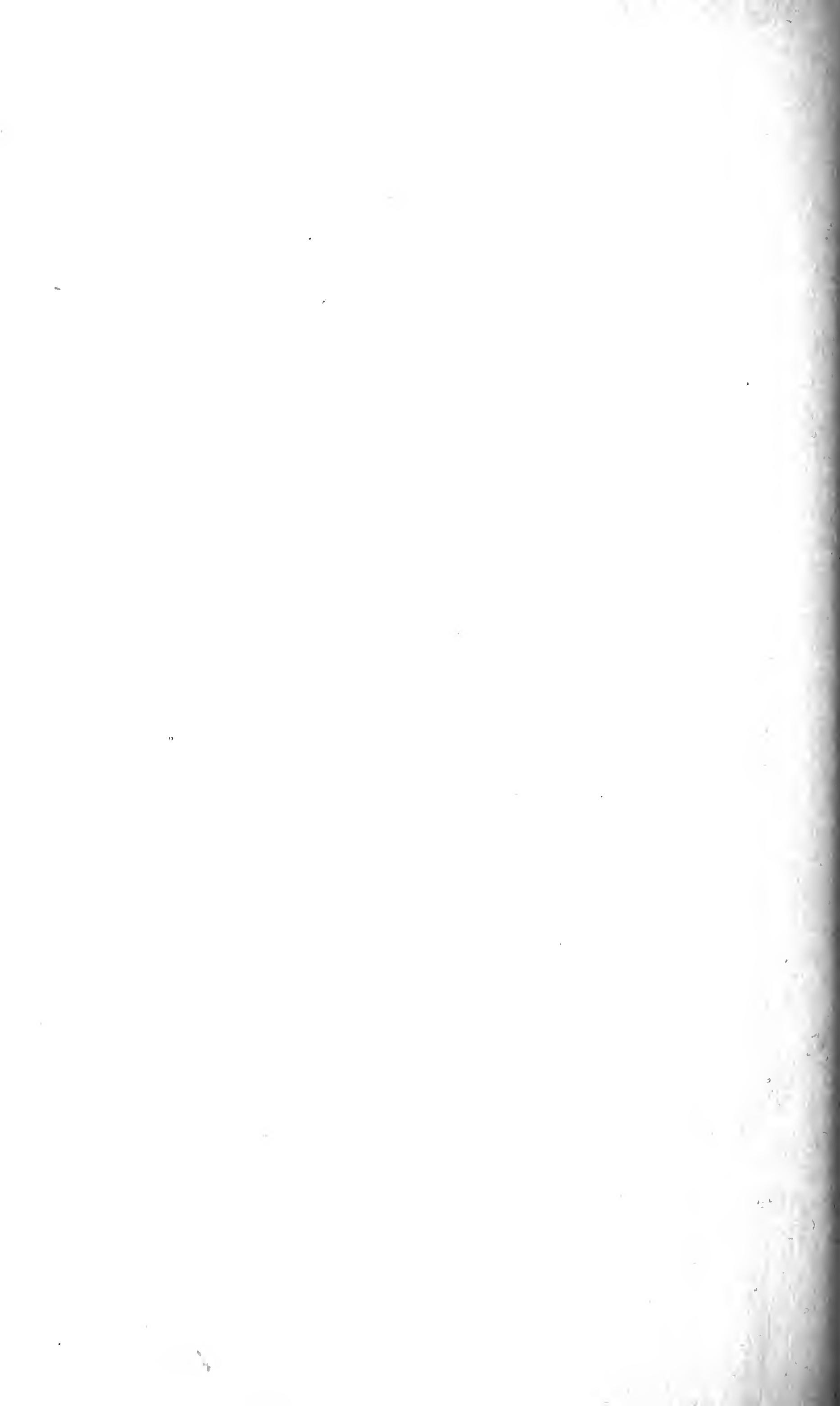

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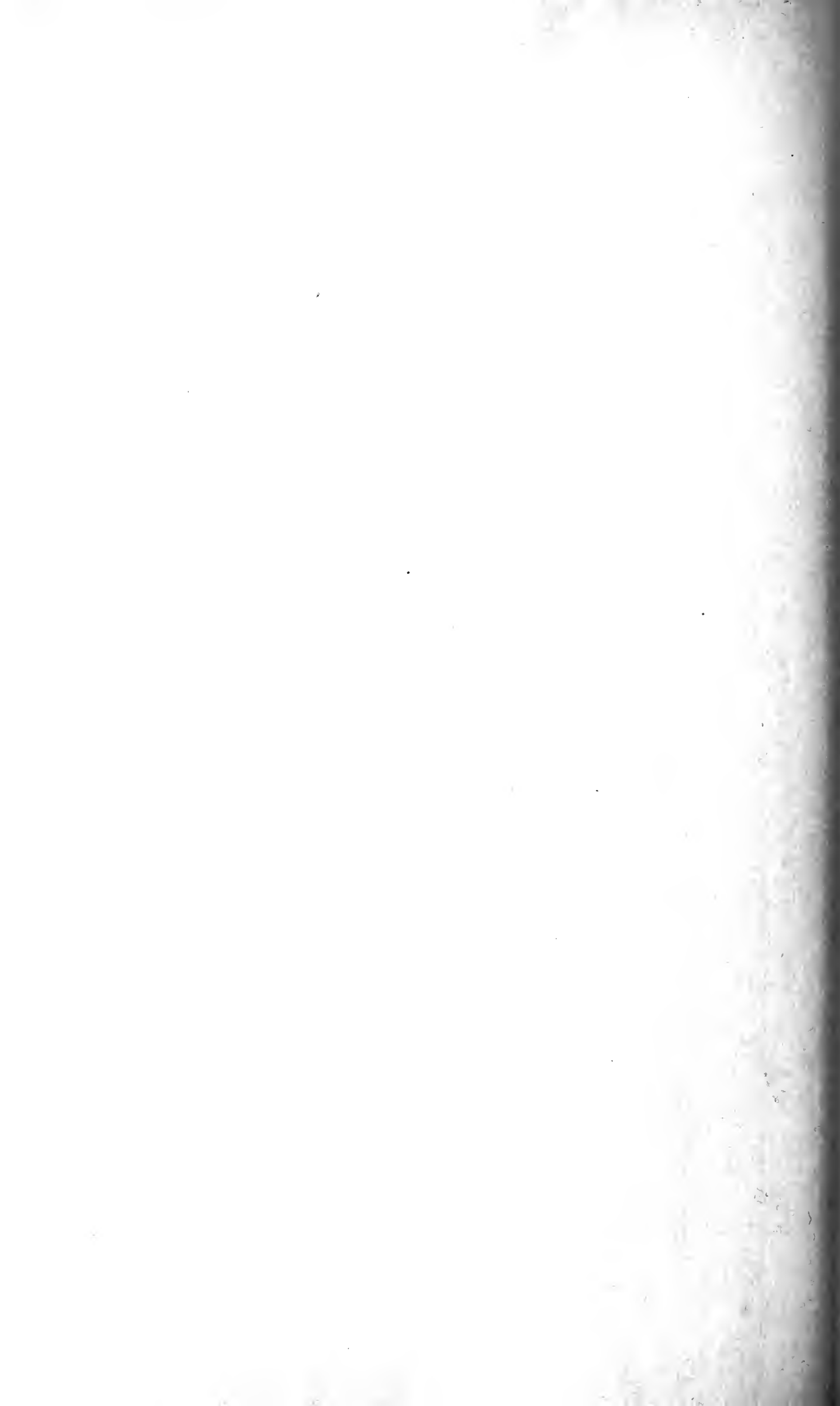

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JURISDICTION

1. The indictment being under Section 2553, Title 26 U.S.C.A. and Section 174, Title 21 U.S.C.A. (Record 2, 3, 4) the United States District Court for the District of Oregon had original jurisdiction under Sec. 41, Title 28 U.S.C.A. (sub 2) as the indictment charged a crime cognizable under the authority of the United States.

2. (a) This Court has appellate jurisdiction over the District Court of Oregon under Section 211, Title 28 U.S.C.A. placing the District of Oregon in the Ninth Circuit.

(b) This Court has appellate jurisdiction over the District Court in a criminal action by reason of Section 225, Title 28, U.S.C.A. which gives this Court such appellate jurisdiction to review by appeal, final decisions in the District Court, except where direct review may be had in the Supreme Court.

STATEMENT OF FACTS

About midnight of January 12, 1943, Federal Narcotic Agents accompanied one Harry Lee who had previously been arrested for violation of the narcotic laws and who volunteered to assist the officers in making a raid on a room behind barred doors where narcotics were allegedly sold, arrived at a room, No. 10 on the third floor of a building located in a portion of town frequented by Chinese. Some of the agents were stationed on the stairway leading down. One of the agents was located at the door of a room just under the room in question and one of the agents, Henry L. Giordano, remained in the hallway just opposite the outer doorway of room No. 10. All of the doors required unlocking in order to open.

The said Harry Lee had been furnished with $50.00 of marked money for the purpose of making a purchase of narcotics, if possible. Harry Lee was then admitted to the room by signaling to those inside through means of a coin placed between two nails which made the contact

necessary to the operation of a buzzer located inside. At that time the agent observed a very strong odor of smoking opium in the hallway.

A few minutes later one James Wong came out of the room and the Agent, Giordano, observed two doors both of which were momentarily opened and a person in the room lying on a flat table with smoking equipment alongside of him, that is, a pipe and a lamp. Also he observed a strong odor of smoking opium coming out of the doorway. James Wong, a Chinese, was apprehended and led down the stairs. A few minutes more elapsed and the doors again opened to the room and the same person lying on the bunk with smoking equipment was observed together with a strong odor of smoking opium. At this time Harry Lee came out and almost immediately thereafter the door again opened and one Wong Suey came out. Wong Suey was apprehended and led over to the stairway. The agent then took Harry Lee to the doorway and made the contact for the buzzer system with a coin that he placed between the two nails. Whereupon he heard a sound in the room as he touched the contact and the first door opened. Harry Lee stepped in between the first and second doors with the agent following, crouching down behind him. A conversation in Chinese between Harry Lee and somebody on the other side of the door ensued and shortly the second door was opened. This

door is large and heavy and had in the center of it a round hole about one inch in diameter. Harry Lee stepped into the room and the agent stepped in close behind him.

There were three persons other than the agent and Harry Lee in the room. They were Nee Toy, Louie Jung, alias Gar Foo, and the appellant Wong Chin Pung. As the agent entered, the Chinese known as Louie Jung was just stepping out from behind a desk which was on the left far side of the room in the corner. Nee Toy was standing by one of the bunks which was situated on the left side of the room against the wall and the appellant Wong Chin Pung was standing by the door that the agent had just entered. They were taken into custody.

The agent then pulled a cord that was situated at the side of the inner door allowing the outer door to open and other agents then entered.

A very substantial quantity of smoking opium was found in the desk behind which Louie Jung was standing and at a later time a very substantial quantity of opium was found in the wood pile in the room. Yen shee, or the residue of opium after it is smoked, was found in all of the pipes which were located on the various bunks of the room. The marked money was found in the drawer of the table behind which Louie Jung was standing.

There were three bunks in the room, one directly in

front of the agent as he entered the room up against the wall on the far side, about three feet high. Upon this bunk there were a mat and smoking opium equipment consisting of a lamp and pipe, of a tray, pipe bowl, yen shee, yen gow, tweezers and other equipment used for smoking. There was an identical bunk on the left side of the room as the agent entered, similarly equipped and on the right side of the room against the wall there was a third bunk of the same type and similarly equipped. In the far left-hand side of the room there was a desk or table. In addition there was a red-hot stove on the opposite side and to the right of the agent as he entered. There was no other equipment in the room. The appellant, Wong Chin Pung's coat hung on the wall behind the desk. There was a trap door that was closed and no other persons had been in the room other than those mentioned.

The bunk by which Nee Toy was standing could not be seen from the hall. The pipe on the bunk directly in front of the door as the agent entered was hot and the one to the left-hand side where Nee Toy was standing was hot and the one on the bunk at the right-hand side of the room was tepid or lukewarm. The appellant, Wong Chin Pung, had been sitting on a bed in the room prior to the entrance of the agent.

ARGUMENT

The appellee agrees with the law cited by appellant that the function of this honorable court is not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence competent and substantial, fairly tending to sustain the verdict.

The appellee finds no fault with the definitions offered by appellant of the word "concealment."

What does the phrase "assisting in concealment" mean? In this connection it seems pertinent to point out the provisions of the law under which the indictment is drawn, Section 174, Title 21, U.S.C.A., which reads as follows:

> "If any person fraudulently or knowingly imports or brings into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

It is noted that the statute contemplates penalizing of any person who in any manner facilitates the concealment of the narcotic drugs defined in that section.

In the case of *Pon Wing Quong vs. The United States,* 111 F. (2d) 751 (Ninth Circuit, 1940) Judge Stevens says: "Anything done to make the trip less difficult would constitute facilitation of its transportation. Since the term 'facilitate' seems not to have any special legal meaning the framers of this statute must have had in mind the common and ordinary definition as expressed in a standard dictionary. Quoting from Webster's Abridged Dictionary 'facilitate' is defined as follows: To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task."

This case and the statute are helpful in determining Congressional intent as to the degree of assistance necessary for conviction.

Webster's New International Dictionary (2d ed.) defines "assist": to stand by or near; to attend; to accompany; to join; to give support to in some undertaking or effort; to lend aid; to help; to be present as a spectator or to assist at a public meeting.

WHAT DOES THE EVIDENCE SHOW

I. Appellant was smoking opium.

Testimony of Agent, Henry L. Giordano:

R-32

A. * * * As the door was opened I could see into the room. There were two doors, and both of them were momentarily opened and I could see a—there was a person lying on a flat table in the room with smoking equipment alongside of him—that is, the pipe and the lamp.

Q. You couldn't identify who that was?

A. No, sir.

Q. Go ahead.

A. At the same time a strong odor of smoking opium came out of the doorway, and as James Wong came out I took him by the arm and led him over to the stairway, where Agent Doolittle was waiting, and turned him over to Agent Doolittle, who led him down the stairs. I again returned to my position opposite the door, and a few minutes more elapsed and the door again opened to room 10 and I could again see in the room and saw the same person—that is, saw the form of a person lying on the bunk with the smoking equipment, and the smoking opium odor was very strong again as the door opened. * * *

R-35

A. The second door opened and Harry Lee stepped into the room and I stepped in right behind

him. As I entered the room I observed three Chinese in the room.

Q. Now, who did they later—

A. (Interrupting) They were later identified as Nee Toy, Louis Jung alias Gar Foo, and Wong * * * And also Wong Chin Pung alias Wong Ben, who is present.

R-36

Mr. Hedlund: Now, what were their positions there in the room when you first walked in?

A. As I walked in *Louis Jung was just stepping out from behind a desk* that was on the left far side of the room in the corner.

Q. All right; and where were the other two?

A. *Nee Toy was standing by one of the bunks or tables that was situated on the left side of the room against the wall, and Wong Chin Pung was standing near the door.*

Q. Near the door that you just entered?

A. Yes, sir.

R-38

A. I didn't examine them for a little while, until a little while after, but there was yen shee residue in all the pipes.

R-47, 48

Mr. Hedlund: Q. Well, tell us a little more about the description of that room. How many chairs or tables were there?

A. There were three tables that were—

The Court: (Interrupting) Go Ahead.

A. There were three tables, one directly as you came in the room, right against the wall, about three feet high, and it had a mat on it, and there was also the smoking opium equipment, the lamp and the pipe, on that table; and there was an identical table on the left side of the room as you came in that also contained the smoking opium equipment; and on the right side of the room, against the wall, there was a third table that contained the lamps and pipes, and so forth.

R-56, 57

The Court: Well, so far as you know, there were just these five defendants in the room?

A. Yes, sir.

The Court: With the exception of possibly this one man that you saw lying on the table?

A. Yes, sir.

Q. Was there a possibility of getting out through some other door?

A. There was a trap door that was closed, but he couldn't have gotten out because it went down to

another room, 2, and there were other agents covering that.

The Court: Then that eliminates the possibility that you saw six men?

A. Yes, sir, your Honor.

The Court: Was that one that you saw on the table smoking?

A. Yes, sir. * * *

The Court: Were there any other doors to this room 10?

A. No, your Honor. It was completely paneled with plywood all the way around, and the window was boarded up with plywood.

The Court: Was there any top door up, or was that the top story?

A. That was the top story, your Honor.

R-70, 71

Q. Then when you looked in that room you couldn't see whether they were smoking opium or not, could you?

A. Well, I could see all the smoking opium equipment in there and the pipe.

The Court: Didn't you say a while ago that you saw one man smoking, lying on the table?

A. That is correct. * * *

Q. You could see him using the pipe?

A. I could see him using the pipe.

R-78

Q. Nee Toy.

A. Yes, sir.

Q. Where was he when you went in the room?

A. He was standing by the bunk on the left-hand side of the room.

R-84

Q. And when you first went into the room Nee Toy was standing by that first left-hand bunk?

A. Yes, sir.

Q. Could you see that from out in the hall?

A. No, sir.

Testimony of Anker M. Bangs:

R-116

Q. Now, when you went up to the room did you examine the smoking-opium pipes about which there has been testimony here?

A. That is the first thing I did when I entered the smoking room proper.

Q. Well, how long was it,—would you have any way of knowing how long it was after Giordano first went into the place that you got in?

A. It was less than ten minutes.

Q. Would you say it was more than eight?

A. No, it was probably even less than that, probably about five or six minutes.

Q. Well, what did you find with reference to the pipes?

A. I found all three lamps red hot, that is, good and hot, and two of the pipe stems and the bowls hot.

R-122

Mr. Hedlund: Q. The hot pipes, Mr. Bangs, you say there was one that was tepid and two that were warm?

A. Yes.

Q. Can you locate those?

A. No, I can't pick out the two that were real hot.

Q. No, I don't mean the pipes themselves, but the place where you found them.

A. *The one directly in front of the door as you came in was hot, and the one to the left-hand side was hot,* and the one to the right-hand side was the tepid or lukewarm one.

Q. And that was on the opposite side of the room from the desk?

A. That is right.

Testimony of Louis Jung, alias Gar Foo:

R-189

Mr. Collier: Wong Chin Pung, stand. Do you know this man here?

A. I know him.

Q. Did you see him on the night, the morning of the arrest, January 13th last?

A. At the time he was arrested he was talking about some news concerning the Japanese war.

Q. And where was he when he was talking?

A. He was inside, sitting on a bed, talking.

From this testimony it can be readily seen that there is substantial evidence from which it can be concluded that the appellant Wong Chin Pung was, at the time Agent Giordano stood outside of the door to room 10 and during the time the doors were opened for the purpose of allowing persons to enter and leave, lying on the bunk opposite the doorway and smoking opium.

The agent has shown that there was a man lying on the bunk opposite the doorway who was smoking opium and when he entered the room there were only three persons in the room. No one could have escaped. The defendant Louis Jung was behind the table at the far left-hand side of the room from the entrance, the defendant Nee Toy was beside a bunk at the near left-hand side of

the room as he entered and the appellant Wong Chin Pung was by the door through which the agent entered.

The man who had been lying on the bunk directly in front of the door was no longer there. The logical conclusion is that the man who had been lying on the bunk smoking was the appellant Wong Chin Pung.

II. The appellant operated and controlled the opening and closing of both the outer and inner doors which were used for the purpose of concealing smoking opium.

Testimony of Henry L. Giordano:

R-33, 34

A. I then took Harry Lee back to the door from the stairway where I had turned Wong Suey over to Agent Doolittle and I stood him right directly in front of the door of room 10. I took a coin that I placed at the contact on the right side of the door, two nails.

Q. In other words, contact between two nails that were set parallel with each other?

A. Yes, sir.

Q. Or alongside of each other, that made a contact?

A. Yes, sir.

Q. Go ahead.

A. I could hear a sound in the room as I touched that contact and the first door opened and Harry Lee stepped in and I stepped in behind him and crouched down behind him between the first and second doors. *There was some Chinese conversation between Harry Lee and somebody on the other side of the door, that is, the second door,* and in just a short period of time the second door was opened.

Q. Now, just one moment. That second door, can you describe it?

A. Yes, sir.

Q. Did it have a window in it?

A. It had a round hole in the door about an inch in diameter, or mayble a little bit larger than that.

R-36, 37

A. Nee Toy was standing by one of the bunks or tables that was situated on the left side of the room against the wall, and *Wong Chin Pung was standing near the door.*

Q. Near the door that you just entered?

A. Yes, sir. * * *

A. * * * The first door had closed behind me as I came in, so I had to pull a cord that was situated as you—as you left the door it was on the left side of the door; it was a cord like a pulley, and I pulled that cord and I allowed—it opened the door and Agents Doolittle and Richmond entered the opium den.

R-50

A. There was a coat hanging on the wall, and which Wong Chin Pung was allowed to put on. It matched his pants that he had on at that time.

Mr. Hedlund: Q. And that coat was where?

A. Hanging on the wall behind the desk.

R-74, 75

Mr. Hannon: Q. Now, then, you accompanied Lee back into the room, did you?

A. Yes, sir.

Q. How did you get in?

A. Through the door.

Q. Did Lee again put the coin in the—

A. I placed the coin at the door.

Q. You placed it?

A. Yes.

Q. Were you out in front of Lee at that time?

A. No, sir.

Q. Oh, was Lee ahead of you?

A. Lee was right by the door, right in front of the door, and I was standing right next to him where the contact was.

Q. You had to be in front of the door in order to put in the coin to unlock the door?

A. Well, the coin was on the right side of the door, on the paneling, and I stood over there and put the coin, and Harry Lee was standing right in front of the door.

Q. And then did the door instantly open?

A. Just within less than a minute.

Q. And when the door opened where were you situated? Where were you standing at the time that door opened?

A. I was standing right a little bit behind Harry Lee, and to his right.

Q. Why were you behind him?

A. Well, he was directly in front of the door.

Q. Well, what was your purpose in getting behind him?

A. To gain entrance.

Q. Well, you had entrance the minute that door opened, didn't you?

A. Oh, no.

Q. What did you have to do after you got through that door?

A. Had to go through another door.

Q. Did that door require any unlocking?

A. All the doors required unlocking.

Q. The doors weren't open?

A. No, sir.

Q. How did you open the second door?

A. The second door was opened by somebody inside.

Q. Did Harry Lee call out, or anything of that kind? How did they know that Lee was there?

A. Well, somebody looked at him through the peek-hole, I believe. I don't know.

Q. And you were still standing behind Harry Lee?

A. Yes, sir.

Q. And that door opened and you and Lee stepped in?

A. That is right.

It can be seen from the testimony that the appellant, Wong Chin Pung, was the person operating the doors, both the outer and the large barred inner door with the small peek-hole in it; that in fact he was the one who carried on the conversation with Harry Lee when Harry Lee attempted to get through the second door closely followed by Agent Giordano, and that immediately upon

entrance to the place the appellant, Wong Chin Pung, was found beside the door and the other two occupants of the room were far removed from the controls. These doors were locked and there is no dispute between appellant and appellee that there were substantial quantities of smoking opium in the room.

The case of *Eng Jung vs. United States,* 46 F. (2d) 66, quoted by appellant, has no application in this case as the facts are clearly distinguishable.

In the case of *Lee Dip vs. United States,* 92 F. (2d) 802 (9th Circuit, 1937), reversal was asked on the ground that there was no evidence tending to connect the appellant with the narcotics found on Chin Fook and on the further ground that the admission of such testimony and of the articles tended to show the commission of crimes other than that for which the appellant was on trial. It was held that the fact that no narcotics were found on the person of the appellant or in his immediate possession, would not defeat a conviction on a charge of felonious concealment of smoking opium.

In the case of *Jindra vs. United States,* 69 F. (2d) 429, the appellant merely informed the witness that he could put him in touch with some narcotics which a woman had for sale and gave the witness a list of certain of these narcotic drugs and he also gave the witness a card with

his name on it and the name and address of the woman. He called the woman by telephone. This testimony was held sufficient to sustain the charge under the same section of law under which the present case was prosecuted.

CONCLUSION

We respectfully submit to the Court that there is competent and substantial evidence fairly tending to sustain the verdict of guilty of assisting in concealing smoking opium in that the appellant had not only been smoking opium behind barred doors but was also the person who was operating the doors in such manner as to assist in the concealment of the smoking opium and, therefore, believe that Judge McColloch's finding should be sustained.

CARL C. DONAUGH,
United States Attorney for the District of Oregon.

WILLIAM H. HEDLUND,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10455

United States
Circuit Court of Appeals
For the Ninth Circuit.

WESTERN VEGETABLE OILS COMPANY, Incorporated, a Corporation,

Appellant,

vs.

SOUTHERN COTTON OIL COMPANY, a Corporation, SOUTHERN PACIFIC COMPANY, a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
JUL - 1 1943
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10455

United States
Circuit Court of Appeals
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WESTERN VEGETABLE OILS COMPANY, Incorporated, a Corporation,

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vs.

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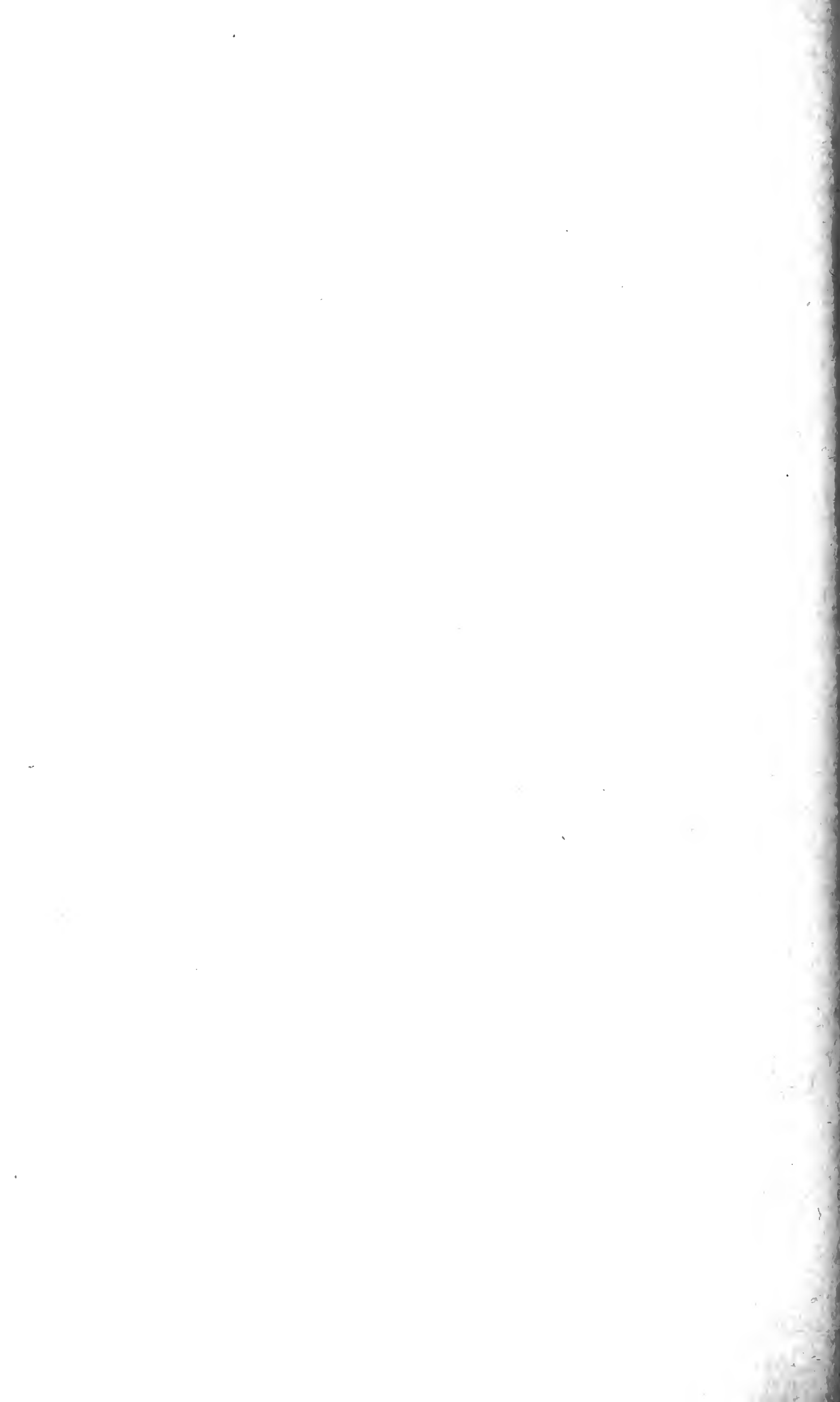

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Defendant and Appellee Southern Pacific Co.

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1000 Merchants Exchange Building
San Francisco, California

Attorneys for Plaintiff and Appellee Southern Cotton Oil Co.

In the Southern Division of the United States District Court, for the Northern District of California

No. 22373-S

SOUTHERN COTTON OIL COMPANY, a corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation; WESTERN VEGETABLE OILS COMPANY, INCORPORATED, a corporation; FIRST DOE COMPANY, a corporation; SECOND DOE COMPANY, a corporation; THIRD DOE COMPANY,

Defendants.

COMPLAINT FOR DAMAGES

Comes now the plaintiff and for cause of action against the defendants above-named alleges:

I.

Plaintiff at all times herein mentioned was, and now is, a corporation organized and existing under the laws of the State of New Jersey.

II.

Defendant Southern Pacific Company, at all times herein mentioned was, and now is, a corporation organized and existing [1*] under the laws of

*Page numbering appearing at foot of page of original certified Trancript of Record.

the State of Kentucky and doing business in the State of California with a principal office at 65 Market Street, San Francisco, California, as a common carrier of goods for hire.

III.

Defendant Western Vegetable Oils Company at all times herein mentioned was, and now is, a corporation organized and existing under the laws of the State of California.

IV.

Plaintiff is ignorant of the true names of the defendants First Doe Company, a corporation, Second Doe Company, a corporation, and Third Doe Company and therefore refers to them by such fictitious names. Defendants First Doe Company and Second Doe Company are corporations duly organized and existing under the laws of one of the states of the United States. Plaintiff prays that when the true names of said defendants are ascertained, such true names be substituted herein and in all records, papers and proceedings herein in lieu of such fictitious designations.

V.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three thousand ($3,000.00) Dollars.

VI.

On or about June 18, 1941, plaintiff and defendant Western Vegetable Oils Company, Incor-

porated, entered into a contract in which the plaintiff agreed to buy and the defendant agreed to sell five (5) tank cars of crude coconut oil, each car to contain approximately 60,000 lbs. of oil, the terms of payment being net cash sight draft, shipment to be made in tank cars of defendant Western Vegetable Oils Company during July, 1941. [2]

VII.

That pursuant to said contract, on or about the 18th day of July, 1941 at Oakland, California, defendant Western Vegetable Oils Company loaded a certain tank car, initial HTCX, No. 1743, with 61,560 pounds of crude coconut oil and delivered said tank car and said crude coconut oil in apparent good order to defendant Southern Pacific Company, as a common carrier of merchandise for hire, for transportation to Gretna, Louisiana. Defendant Southern Pacific Company received said tank car and said coconut oil and agreed to transport the same to Gretna, Louisiana, and there to deliver said tank car and coconut oil in like order and condition as when received to the order of Western Vegetable Oils Company pursuant to an Order bill of lading then and there issued to defendant Western Vegetable Oils Company by defendant Southern Pacific Company.

VIII.

That on or about the 21st day of July, 1941, defendant Western Vegetable Oils Company presented to plaintiff its invoice for said shipment of

61,560 pounds of coconut oil and received payment therefor from plaintiff; that defendant Western Vegetable Oils Company thereupon endorsed in blank and delivered to plaintiff said original order bill of lading for said tank car and coconut oil and plaintiff thereby became and at all times herein mentioned was and now is, the holder of said bill of lading and entitled to the delivery and possession of said coconut oil at Gretna, Louisiana.

IX.

Defendants Western Vegetable Oils Company and Southern Pacific Company, and each of them, failed and neglected to deliver said shipment, or any part thereof, to plaintiff at said Gretna, Louisi- [3] ana, or at any other place at all. Plaintiff is informed and believes, and therefore alleges that said shipment of coconut oil leaked from said tank car while in the custody of defendant Southern Pacific Company for transportation as aforesaid.

X.

On or about the 19th day of August, 1941, plaintiff made claim for the value of said coconut oil on each of said defendants, Southern Pacific Company and Western Vegetable Oils Company, Incorporated, but each of said defendants has refused to make payment of said claim to plaintiff and each of said defendants claims that the other defendant is liable for said loss.

XI.

Plaintiff is informed and believes and therefore alleges that the loss of said shipment of coconut oil was due to the fact that defendant Western Vegetable Oils Company, or defendant Southern Pacific Company, or both of said defendants, negligently failed to seal or close the outlet valve of said tank car at time of loading, or negligently failed to make a proper inspection of said tank car before and after loading the same, or negligently failed to inspect or care for said tank car and its contents during transit, or loaded said shipment into a tank car having a defective outlet valve, or loaded said shipment into a car which was not fit or tight for the transportation of a shipment of crude coconut oil.

XII.

By reason of the premises, plaintiff has been damaged in the sum of $3,847.50, no part of which has been paid, and the whole thereof is now due, owing and unpaid from said defendant Western Vegetable Oils Company or from defendant Southern Pacific Company or from both of said defendants to the plaintiff. [4]

Wherefore, plaintiff prays judgment against the defendant Western Vegetable Oil Company or against the defendant Southern Pacific Company, or against both in the sum of $3,847.50, with interest thereon at the rate of seven per cent (7%) per annum from the 18th day of July, 1941, for its

costs of suit herein, and for such other and further relief as in law and justice it may be entitled to receive.

DERBY, SHARP, QUINBY & TWEEDT
Attorneys for Plaintiff. [5]

(Duly Verified.)

[Endorsed]: Filed Nov. 19, 1942. [6]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY

Now comes the above-named defendant and answering complaint herein admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I, II and X.

II.

This defendant is without knowledge or information suf- [7] ficient to form a belief as to the truth of the averments therein contained and basing its answer on those grounds denies generally and specifically each and every allegation contained in paragraphs III, IV, V, VI and VIII.

III.

Answering paragraph VII of plaintiff's complaint, this defendant denies that, pursuant to said contract or any contract, defendant Western Vege-

table Oils Company, Incorporated, delivered to this defendant that certain tank car, initial HTCX, No. 1743, loaded with 61,560 pounds of crude coconut oil, and denies that it agreed to deliver said tank car and coconut oil at Gretna, Louisiana, or at any place to the order of the Western Vegetable Oils Company, Incorporated, or to anyone in like order or condition as when received or in any manner whatsoever other than in accordance with the terms and conditions of a uniform order bill of lading approved by the Interstate Commerce Commission issued to defendant Western Vegetable Oils Company, Incorporated, by defendant Southern Pacific Company, a copy of which is annexed hereto, marked Exhibit "A" and to which reference is hereby made, and pursuant to the rates, rules and regulations contained in this defendant's tariffs duly posted, published and on file with the Interstate Commerce Commission.

IV.

This defendant denies each, every and all of the allegations contained in paragraph IX of plaintiff's complaint except that this defendant admits that the contents of said tank car were lost in transit and that this defendant did not deliver the said shipment or any part thereof to the plaintiff or to anyone at the said Gretna, Louisiana, or at any other place or at all.

V.

This defendant denies each and every allegation contained in paragraph XI of plaintiff's complaint

in so far as they [8] refer to this defendant and admits each and every allegation contained in said paragraph in so far as they refer to the defendant Western Vegetable Oils Company, Incorporated. In this behalf this defendant alleges that neither it nor any of its agents or employees had anything to do with the loading of the said tank car.

VI.

This defendant denies generally and specifically each and every allegation of plaintiff's complaint not expressly admitted or denied for lack of information or belief by this answer and denies that by reason of any act or acts, fault, carelessness, omission or omissions upon the part of this defendant or any of the agents or employees of this defendant, said shipment or any portion thereof was damaged or lost as alleged in said complaint or that the plaintiff herein was damaged in the sum of $3,847.50 or any other sum, or at all.

For a First, Separate and Distinct Defense:

This defendant is informed and believes and therefore alleges that tank car, initial HTCX, No. 1743, referred to in paragraph VII of plaintiff's complaint, was owned or leased by the defendant Western Vegetable Oils Company, Incorporated; that said tank car was of peculiar construction and was used in the transportation of liquid commodities such as coconut oil; that said tank car was loaded by and under the supervision of the defendant Western Vegetable Oils Company, Incorporated, and that when it was delivered to this defendant at

Oakland, California, it was improperly loaded and/or was in a defective condition, in that the outlet valve of the said car did not seat properly; that reasonable and ordinary inspection made by the agents and employees of this defendant at the time of delivery of said car to this defendant, or as soon thereafter as practicable, or at any other time, failed to disclose that said car was improperly loaded or [9] was in a defective condition as aforesaid until it was found to be leaking while it was in transit; that said reasonable and ordinary inspection made by the agents and employees of this defendant would not disclose whether said car was properly or improperly loaded and/or in a defective condition as aforesaid, because of its peculiar construction.

For a Second, Separate and Distinct Defense:

This defendant further alleges that the said shipment of coconut oil was transported in accordance with this defendant's tariffs, duly posted, published and on file with the Interstate Commerce Commission and in conformance with the terms and conditions and provisions of the uniform order bill of lading approved by the Interstate Commerce Commission, hereinbefore referred to as Exhibit "A" in this answer and to which reference is hereby made, and in this behalf this defendant alleges that included in the said terms and conditions of the said bill of lading issued for the transportation of said shipment was the following express provision:

> "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto

or delay caused by * * * the act or default of the shipper or owner * * *".

In this behalf, this defendant alleges that any and all loss to the said shipment was solely due to the act or default of the shipper and defendant Western Vegetable Oils Company, Incorporated, in that it failed to properly load the said shipment of coconut oil and/or loaded it into a defective car that was not suitable or fit for the transportation of said shipment of coconut oil.

For a Third, Separate and Distinct Defense:

This defendant alleges that the records of this defendant disclose that the said shipment was handled by its agents [10] and employees in a usual and customary manner without negligence, and it is further alleged that if the said shipment had been properly loaded by the said Western Vegetable Oils Company, Incorporated, in a suitable and satisfactory car for the transportation of liquid commodities such as coconut oil, the said shipment would have been delivered at its destination and the loss of said coconut oil would not have occurred.

Wherefore, this defendant prays that plaintiff take nothing by reason of its action herein and that as to it the said complaint be dismissed; that this defendant have judgment, together with its costs, and for such other and further relief as to the Court may seem just and proper.

A. A. JONES

A. T. SUTER

Attorneys for defendant
Southern Pacific Company

Service of copy of the within Answer is admitted this 12th day of January, 1943.

DERBY, SHARP, QUINBY & TWEEDT

Attorneys for Plaintiff [11]

(For use in connection with Uniform Domestic Order Bill of Lading adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

UNIFORM ORDER BILL OF LADING

This Shipping Order must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon and retained by the Agent

Shipper's No.................... Agent's No....................

SOUTHERN PACIFIC COMPANY—
PACIFIC LINES

Receive subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order, at Oakland California July 18, 1941 from Western Vegetable Oils Company the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined, as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if

on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original Order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

Consigned to Order of Western Vegetable Oils

Destination Gretna State of Louisiana County of ....

(Mail or street address of consignee—For purposes of notification only.)

Notify Southern Cotton Oil Company

At Gretna State of Louisiana County of........

Route SP—T&NO 17764

Delivery Carrier Car Initial HTCX Car No. 1743

No. Packages T/C

Description of Articles, Special Marks, and Exceptions Crude Coconut Oil (Made from Philippine Copra).

*Weight (Subject to Correction) Est. 60000—64=

Class or Rate

Check Column

Gross Weight Actual Tare Net Weight

(Weigh Agt. Destn. Ascertain If Loaded Full Shell Cpty. Rule 35 CFC #14

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

.... per ....

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. 38400 (Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid." ....

Received $........., to apply in prepayment of the charges on the property described hereon.

.... Agent or Cashier

Per.. (The signature here acknowledges only the amount prepaid.)

Charges advanced: $..............................

WESTERN VEGETABLE OILS COMPANY

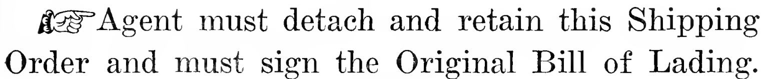
Shipper.

Per RALPH J. BOOMER

Permanent post-office address of shipper..............

2 H. R. WILLIAMS

SP


☞Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

7-18-41

[Printer's Note: The reverse side is a printed form consisting of Contract Terms and Conditions.]

Receipt of Service

[Endorsed]: Filed Jan. 12, 1943. [13]

[Title of District Court and Cause.]

ANSWER OF WESTERN VEGETABLE OILS COMPANY, INCORPORATED

Comes now defendant Western Vegetable Oils Company, Incorporated and answering plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering the allegations of paragraph VI of said complaint this defendant denies all and singular said allegations and each and every part thereof; further answering the allegations of said paragraph defendant alleges that on or about the 18th day of June, 1941 plaintiff and defendant entered

into a written contract a copy of which is attached hereto, marked Exhibit "A" and made a part hereof; that said contract contains among its provisions a [14] provision reading as follows:

> "(6) This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof. Clause Paramount: This contract is subject to the published Rules and Regulations of the National Institute of Oilseed Products — and which are hereby made a part of this contract, except insofar as such Rules and Regulations are modified or abrogated by this contract."

that the published Rules and Regulations of the National Institute of Oilseed Products referred to in said contract and made a part thereof contain, among other rules, the following:

RULE 64—

> "Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products."

that defendant, under and by virtue of the terms of said contract, has demanded arbitration of the dispute between plaintiff and defendant which is the subject of plaintiff's complaint against this defendant on file herein, that plaintiff has failed and refused to submit said dispute to arbitration as

required by the terms of said contract, that this action must be stayed until an arbitration has been had in accordance with the terms of said contract.

II.

Answering the allegations of paragraph IX of said complaint beginning with the word "defendants" in line 27 of page 3 of said complaint and ending with the words "at all" in line 1 of page 4 of said complaint this defendant denies all and singular said allegations and each and every part thereof; further answering the allegations of said paragraph beginning with the word "plaintiff" in line 1 page 4 of said complaint and ending with the word "aforesaid" in line 4 of said page of said complaint defendant avers that it has no information or belief sufficient to enable it to answer said allegations and basing its denial upon that ground denies all and singular said allegations and each and every part thereof. [15]

III.

Answering the allegations of paragraph XI of said complaint beginning with the word "defendant" in line 15 of page 4 of said complaint and ending with the words "Company, or" in said line of said page of said complaint and beginning with the word "or" in line 16 of said page of said complaint and ending with the word "defendants," in said line of said page of said complaint and beginning with the words "to seal" in line 17 of said page of said complaint and ending with the word "failed" in line 19 of said page of said complaint

and beginning with the words "or loaded" in line 21 of said page of said complaint and ending with the words "coconut oil" in line 23 of said page of said complaint, this defendant denies all and singular said allegations and each and every part thereof.

IV.

Further answering the allegations of paragraph XI of said complaint this defendant alleges that said contract dated the 18th day of June, 1941, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof, contains among its provisions a provision reading as follows:

> "Price: Five and Seven Eighths Cents 5-7/8c) per pound F. O. B. Seller's Plant, Outer Harbor, Oakland, California"

this defendant further alleges that said published Rules and Regulations of the National Institute of Oilseed Products referred to in said contract and in paragraph I of this answer contain among other rules the following:

> "Rule 7.—F.O.B. Cars. (Name of departure point). Seller must load goods on or in cars, or trucks, secure carrier's bill of lading and be responsible for all loss or damage until goods are placed on/in cars or trucks at named departure point, and clean bill of lading is furnished by carrier. All further risk is for account of Buyer."

that under and by virtue of the terms of said contract and said Rules this defendant loaded said

61,560 lbs. of Crude Coconut Oil [16] into that certain tank car described in plaintiff's complaint on file herein and delivered said tank car and said crude coconut oil in apparent good order and condition to defendant Southern Pacific Company as alleged in paragraph VII of said complaint; that defendant Western Vegetable Oils Company, Incorporated has fully performed all of the terms and conditions of said contract on its part to be performed.

V.

Answering the allegations of paragraph XII of said complaint this defendant denies that plaintiff has been damaged in said sum of $3,847.50, or in any other sum or at all; this defendant further denies that said sum of $3,847.50, or any other sum, is now, or at any time mentioned in said complaint has been, due, owing or unpaid from this defendant to plaintiff.

Wherefore, this defendant prays that this action be stayed as against this defendant until an arbitration has been had between plaintiff and this defendant of the issue in this action arising out of said contract in accordance with the terms of said contract and that plaintiff take nothing against this defendant by its complaint on file herein and that said defendant be dismissed hence with its costs of suit incurred herein and for such other and fur-

ther relief as the Court may deem proper in the premises.

MANSON, ALLAN & MILLER
Attorneys for Defendant
Western Vegetable Oils
Company, Incorporated.

(Duly Verified.) [17]

EXHIBIT "A"

WESTERN VEGETABLE OILS COMPANY

24 California Street
San Francisco California

Plant:
Outer Harbor
Oakland, California

CONTRACT

Buyer's Contract No............
Seller's Contract No. 28/169

Contract made at Oakland, California, this 18th day of June, 1941, between Western Vegetable Oils Company, Incorporated (a California Corporation), hereinafter called the Seller, and Southern Cotton Oil Company, Att'n: Mr. H. O. Rinne, Chicago, Illinois, hereinafter called the Buyer.

The Seller hereby sells and agrees to deliver, and the Buyer hereby purchases and agrees to receive the amounts and on the terms and conditions herein set forth:

Commodity: Crude Coconut Oil, manufactured from Copra produced in the Philippine Islands

Quality: Manila Type, Maximum 6% F. F. A.

Quantity: Five (5) Tankcars of approximately 60,000 pounds each

Packing: Seller's Tankcars

Shipment: July, 1941

Price: Five and Seven Eighths Cent (5-7/8c) per pounds F. O. B. Seller's Plant, Outer Harbor, Oakland, California

Terms of Payment: Net Cash, Sight Draft

Remarks: Shipping Instructions to follow. Sale made through Zimmerman Alderson Carr Co., Chicago.

Conditions:

(1) This sale is based upon the present Tariff and Customs House Classification, any increase or decrease in duty due either to a change in rate or method of assessment shall be for Buyer's account.

(2) Any tax or other government charges upon production, sale and/or shipment of goods sold hereunder, now imposed by Federal, State or Municipal authorities, or hereafter becoming effective, shall be added to the price herein provided, and shall be paid by the Buyer.

(3) Pacific Coast sampling and analysis shall be final unless otherwise specifically stated in contract. On all deliveries involving shipment by rail, Transcontinental Freight Bureau weight certificate shall govern.

(4) Seller shall not be responsible for delay or non-delivery, nor for any damage or loss resulting directly or indirectly from Acts of God, Perils of the Sea, Restrictions imposed by any government,

State or Governmental Authority, Fire, War, Strike, Commandeering of Vessels, Insurrections, Floods, Droughts, or from any cause beyond the control of the Sellers at any time, but such delay shall not excuse Buyers from accepting delayed and/or later delivery.

(5) In case of default in payment of any installment of purchase money when due, or in case the financial resources of the Buyer become impaired or unsatisfactory to the Seller during the life of this contract, Seller may either declare the whole sum owing by the Buyer immediately due and payable and further deliveries by the Seller against the contract shall be made only for cash in advance, or Seller may at its option cancel this contract. The option hereby given to Seller shall be in addition to and not to the exclusion of any other remedy provided by law.

(6) This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof,

Clause Paramount: This contract is subject to the published Rules and Regulations of the National Institute of Oilseed Products—and which are hereby made a part of this contract, except insofar as such Rules and Regulations are modified or abrogated by this contract.

WESTERN VEGETABLE OILS COMPANY, INCORPORATED,

By W. A. DOWF.

Seller.

THE SOUTHERN COTTON
OIL CO.
C. J. SCHMIDT
Buyer.

[Endorsed]: Filed Feb. 1, 1943.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STAY ACTION

To Messrs. Derby, Sharp, Quinby & Tweedt
Attorneys for Plaintiff, Southern Cotton Oil Company, a corporation, and

To Messrs. A. A. Jones and A. T. Suter
Attorneys for Defendant, Southern Pacific Company, a corporation:

You and each of you will please take notice that on the 8th day of February, 1943 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, defendant Western Vegetable Oils Company, Incorporated will move the above-entitled Court at United States Post Office and Courthouse Building, Seventh and Mission Streets, San Francisco, California, for an order of said Court staying the above-entitled action as to said defendant Western Vegetable Oils Company, Incorporated, [19] until an arbitration has been had in accordance with the terms of a written contract out of which the issues between plaintiff and said defendant Western Vegetable Oils Company, Incorporated arise:

Said motion will be made upon the following grounds:

1. That the issues in the above-entitled action as between plaintiff and defendant Western Vegetable Oils Company, Incorporated, arise out of a written contract entered into between plaintiff and said defendant on or about the 18th day of June, 1941, a copy of which is attached to the answer of said defendant on file herein, and marked Exhibit "A" thereto, and which is hereby incorporated by reference.

2. That said contract contains among its provisions a provision reading as follows:

> "(6) This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof. Clause Paramount: This contract is subject to the published Rules and Regulations of the National Institute of Oilseed Products—and which are hereby made a part of this contract, except insofar as such Rules and Regulations are modified or abrogated by this contract."

3. That the published Rules and Regulations of said National Institute of Oilseed Products referred to in said contract and made a part thereof contain among other rules, the following:

> "Rule 64—Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Com-

merce under the Rules of the National Institute of Oilseed Products."

4. That under the provisions of Sections 1280 to 1293 inclusive, of the Code of Civil Procedure of the State of California said issues between plaintiff and this defendant in the above-entitled action arising from said contract are required to be submitted to arbitration as provided in said contract; that by the terms of Section 1284 of said Code of Civil Procedure of the State [20] of California said action must be stayed until such arbitration has been had in accordance with the terms of said contract.

Dated: February 3, 1943.

MANSON, ALLAN & MILLER
Attorneys for Defendant Western Vegetable Oils Company, Incorporated.
808 Kohl Building
San Francisco, California.

Receipt of Service.

[Endorsed]: Filed Feb. 3, 1943. [21]

[Title of District Court and Cause.]

AFFIDAVIT OF ADOLPH SCHUMANN IN SUPPORT OF MOTION TO STAY THE ABOVE ENTITLED ACTION UNTIL ARBITRATION HAS BEEN HAD, AND IN ANSWER TO AFFIDAVIT OF LLOYD M. TWEEDT ON FILE HEREIN

State of California
City and County of San Francisco.—ss.

Adolph Schumann, being first duly sworn deposes and says: That he is an officer, to-wit: the president of Western Vegetable Oils Company, Incorporated, a corporation, one of the defendants in the above entitled action, and that he makes this affidavit for and in behalf of said defendant.

That in the affidavit of Lloyd M. Tweedt on file herein appears, in lines 20 to 24 of page 2. of said affidavit the following statement: "That said defendant, Western Vegetable Oils [22] Company, Incorporated, never demanded or requested submission of said claim or the controversy between plaintiff and said defendant for liability for said damage to arbitration prior to the filing of the complaint herein as aforesaid; "that said statement in said affidavit is untrue; that the shipment of coconut oil referred to in plaintiff's complaint on file herein was sold by defendant, Western Vegetable Oils Company, Incorporated to plaintiff through Zimmerman Alderson Carr Company of 105 West Adams Street, Chicago, Illinois as shown by the written contract of sale covering said shipment at-

tached to said defendant's answer on file herein; that on the 26th of May, 1942 your affiant, on behalf of said defendant sent to said Zimmerman Alderson Carr Company a letter, a copy of which is attached to this affidavit and marked Exhibit "A" hereto; that the fifth and sixth paragraphs of said letter read as follows:

"According to the terms of our contract, since there is a dispute, it would seem to us that an arbitration might be the sensible thing. The amount involved is $3800.00. If the thing goes into Court, it will be costly to everybody and probably the Attorneys will be the only ones who wind up in the money."

"We would appreciate it if you would take this up with the proper parties at Southern Cotton Oil Company,—don't know whether this would come under Mr. Rinne's jurisdiction or not, but it seems so unnecessary that a Law suit should be placed."

That on or about the 19th day of June, 1942 your affiant received from said Zimmerman Alderson Carr Company a letter dated the 16th day of June, 1942, a copy of which is attached to this affidavit, and marked Exhibit "B" hereto; that enclosed with said letter of June 16, 1942 was a letter from plaintiff to said Zimmerman Alderson Carr Company dated June 15, 1942, a copy of which is attached to this affidavit and marked Exhibit "C" hereto; that the third paragraph of said letter of plaintiff dated June 15, 1942, marked Exhibit "C" hereto reads as follows: [23]

> "Mr. Schumann refers to arbitration, and it seems to me that if there is any arbitration, it should be between the Western Vegetable Oils Company and the railroad, because we should not be made to stand any part of the loss. Don't you agree?"

That on or about the 19th day of June, 1942 your affiant on behalf of this defendant wrote to said Zimmerman Alderson Carr Company a letter, a copy of which is attached to this affidavit and marked Exhibit "D" hereto; that some time prior to said 19th day of June, 1942 an associate of Derby, Sharp, Quinby & Tweedt, attorneys for plaintiff, whom your affiant believes to have been one John J. Whelan, called upon your affiant at the office of said defendant, 24 California Street, San Francisco, California; that at that time and place your affiant exhibted to said associate the letters above specified and stated to him that this defendant desired to submit the subject matter of the above entitled action to arbitration; that said associate then stated that he would so advise plaintiff and would communicate with your affiant later; that your affiant received no further communications from plaintiff or plaintiff's attorney until the above entitled action was commenced.

That attached to this affidavit and made a part hereof is a copy of the "Rules of the National Institute of Oil Seed Products"; that said Rules are the rules referred to in the written contract between plaintiff and defendant, a copy of which is

attached to this defendant's answer on file herein;

That your affiant denies that this defendant has at any time waived or abandoned any right it may have to submit to arbitration the controversy which is the subject of the above entitled action.

ADOLPH SCHUMANN

Subscribed and sworn to before me this 24th day of February, 1943.

[Seal] EDITH GOEWEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 23, 1944. [24]

EXHIBIT "A"

(Copy)

May 26, 1942.

Ail Mail

Zimmerman Alderson Carr Company,
Chicago, Illinois.

Gentlemen:—

On July 21st, 1941, we shipped a carload of Coconut Oil to Southern Cotton Oil Company at Gretna.

This car, enroute, lost its entire contents, and the Southern Cotton Oil Company naturally claimed on the Railroad Company, who always turn those things down, and in turn, wrote their San Francisco Office, who spoke to us on this matter a number of times. The San Francisco man, who was

handling this affair, has died, and the next we hear is that the matter has been placed in the hands of an Attorney and a letter has been written to our Attorney in connection with it.

We are sorry the matter has gone into the hands of Attorneys, especially the ones that it has been turned over to, as naturally they will want to go ahead and sue probably the Railroad, the Tankcar Company and ourselves. The way we look at a thing like this is that we always try to take a very broad view, just like we did in the washing out of the sale to the Southern Cotton Oil Company; we think we probably could have stood on the contract and claimed Force Majeure, but we did not choose to do it.

Now on this tankcar affair, we truly think our position is correct in that we had gotten a signed Bill of Lading from the Railroad Company and also a Railroad Weight Tag on the car; the Railroad Scale is about one hundred feet from our Plant and the Railroad man inspects and weighs the car. We think that we are absolutely clear in this matter, but seemingly, since the Southern Cotton Oil Company has the thing in the hands of Attorneys, they want to prosecute the matter.

According to the terms of our contract, since there is a dispute, it would seem to us that an Arbitration might be the sensible thing. The amount involved is $3800.00. If the thing goes into Court, it will be costly to everybody and probably the Attorneys will be the only ones who wind up in the money.

We would appreciate it if you would take this up with the proper parties at Southern Cotton Oil Company—don't know whether this would come under Mr. Rinne's jurisdiction or not, but it seems so [25] unnecessary that a Law suit should be placed.

Will you kindly follow this up for us?

Kindest Regards,

WESTERN VEGETABLE OILS COMPANY, INC.

T. [26]

EXHIBIT "B"

(Copy)

ZIMMERMAN ALDERSON CARR COMPANY

105 West Adams Street

Telephone Randolph 2037 Chicago, Ill.

June 16, 1942

A. Schumann & Co.
24 California Street
San Francisco, Calif.

Gentlemen:

Refer to your letter to us of May 26th and find attached original letter from Ed Reinke of Southern Cotton Oil Company, together with letter attached from their Mr. Barnett, Traffic Manager, to William Lyons, Assistant Secretary and Treasurer.

We shall await further instructions from you on this matter.

Yours very truly.

B.

ZIMMERMAN ALDERSON CARR COMPANY

WBB:NMH
Enclosures [27]

EXHIBIT "C"

(Copy)

THE SOUTHERN COTTON OIL COMPANY
1464 West 37th Street
Chicago, Ill.

June 15, 1942

Mr. W. B. Burr
Zimmerman Alderson Carr Company
105 West Adams Street
Chicago, Illinois

Dear Mr. Burr:

I attach copy of a memo written by our Traffic Manager, Mr. Barnett, to Bill Lyons, regarding the claim against the Western Vegetable Oils Company.

In sending this copy of Barnett's memorandum to me, Bill Lyons asks if I have any comments to make. It would seem to me that there is only one procedure, and that is to allow the claim to be settled in court. If you get any thoughts, especially after hearing from Mr. Schumann further, I should be pleased to hear from you.

Mr. Schumann refers to arbitration, and it seems

to me that if there is any arbitration, it should be between the Western Vegetable Oils Company and the railroad, because we should not be made to stand any part of the loss. Don't you agree?

Yours truly,

THE SOUTHERN COTTON OIL COMPANY

E. L. REINKE

Manager

ELR AWM [28]

(Copy)

MEMORANDUM

June 4 1942

To Mr. M. W. Lyons, Asst. Secy.-Asst. Treas.

From S. R. Barnett

Referring to the letter to you of May 29th from Mr. Reinke to which is attached a letter from the Western Vegetable Oils Company of San Francisco, California, and one from the Zimmerman Alderson Carr Company of Chicago, in connection with the loss of a tank of Coconut Oil shipped in HTCX 1743 from Oakland, California, last year, via the Southern Pacific, by the Western Vegetable Oils Company to their order, notify us.

The railroad, after considerable correspondence and lapse of time, denies liability. It states that it was discovered at Aden the outlet capt was off. The car was then taken to El Paso shops at El Paso, Tex.

This was a seller's tank car. The car was returned to the West Coast by the railroad on some-

body's instructions, not ours, who gave these instructions, the correspondence does not disclose.

The case develops into a triangular trial for these reasons; the railroad has denied liability and says this is an owner's defect. We paid the draft. Somebody has to make us whole and it is necessary to join both the shipper and the railroad to determine at the trial of the case who, in fact, is liable to us for the loss. We are certainly the innocent party.

This case is very much like the case we had at Ballinger, Texas, several years ago, in that the shipper claims he properly loaded the car; the oil was lost; the carrier denied that the loss was caused by it.

The tank car was not our tank car, but was a tank car furnished by the shipper. If, as is indicated by the Western Vegetable Oils Company's letter, it is not its responsibility, then it should not fear the litigation, and the railroad will be cast, if it is responsible, not only for the amount of the claim, but all incidental expenses, such as attorneys' fees and costs.

It became necessary for us to file suit to tell the statute of limitations so that we would be in court in time to protect our interests and because of the above facts, it was necessary to join as defendants, not only the railroad, but the shipper as well.

I return your papers.

Mr. Kammer has all of the file or he has sent it to the attorneys on the Coast.

S. R. BARNETT

SRB:rm
Attmt. [29]

EXHIBIT "D"

(Copy)

June 19, 1942

Zimmerman Alderson Carr Company,
105 West Adams Street
Chicago, Illinois

Gentlemen:

We refer to your letter of June 16 relative to Southern Cotton Oil Company Claim. I have also read the memorandum from Mr. Barnett to Mr. Lyons, as well as Mr. Reinke's letter to you.

We don't know what to say as we can't see it their way at all. If we were selling them on a delivered basis destination it would be one thing, but when they are buying f. o. b. our Mill under certain weight conditions it is another.

In Mr. Barnett's memorandum he suggests that we might fear litigation which we do not. It is the old story, I guess, the traffic man is like the claims department of a railroad, they love to have their desks full of files and unsettled matters, otherwise they would not have a job.

We are not going to admit responsibility and then go after the railroad. It is a matter entirely between the Southern Cotton Oil Company and the Railroad, if we are drawn into it well and good.

We want to thank you very much for your trouble in this matter.

We had a talk with their Attorneys here and said something about arbitration and they were very

happy to go ahead on such a deal. What will happen we do not know.

Very truly yours,

WESTERN VEGETABLE OILS CO. INC.

By

AAS:FN [30]

[Endorsed]: Filed Feb. 25, 1943.

NATIONAL INSTITUTE OF OILSEED PRODUCTS

SAN FRANCISCO, CALIFORNIA

U. S. A.

TRADING RULES

Effective February 1, 1940

SECRETARIAT:

149 California Street
San Francisco, California
U. S. A.
Cable Address: NIOSPROD

NATIONAL INSTITUTE OF OILSEED PRODUCTS

SAN FRANCISCO, CALIFORNIA
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PRINTED IN U.S.A.

NATIONAL INSTITUTE OF OILSEED PRODUCTS

San Francisco, California, U. S. A.

The following RULES having been approved and adopted by the NATIONAL INSTITUTE OF OILSEED PRODUCTS, and a copy thereof having been sent to all members, these RULES will be effective and in force on February 1st, 1940.

Any modification thereof, which may be incorporated in the rules from time to time, will be communicated to all members and become effective on the date stated in the advice of adoption.

GENERAL RULES

DEFINITION OF TERMS

RULE 1.—C.I.F. *(Cost, insurance and freight)*. Under a C.I.F. sale the price includes the cost of the merchandise placed on board the vessel, freight and marine insurance F. P. A. (War risk insurance, if required, to be covered on terms to be agreed upon between Buyer and Seller). Seller is not responsible for the arrival of goods at destination, nor for loss or damage in transit. The clauses of the bills of lading and of the certificates or policies of insurance covering the merchandise are binding upon the buyer just as though set forth in detail in these rules. The bills of lading shall be "clean."

Buyer to pay all duties, clearance, wharfage charges, or any other expenses beyond completion of loading at point of shipment, except freight and insurance as specified above.

When C. I. F. sales are "qualified," such as by: landed weights, or landed quality, or duty allowed, the only change in sellers' responsibility shall be as regards such specifically qualified conditions, and contract shall be otherwise construed as though it were on unqualified c. i. f. terms, and the goods, in all other respects, shall be for account and risk of the buyer when shipped.

RULE 2.—C. & F. *(Cost and freight)*. A C. & F. sale differs from a C. I. F. sale only in that the buyer is responsible for the insurance after the goods have been loaded on vessel and the documents passing ownership tendered.

However, vessel furnished must be A 1 Lloyds or equivalent classification; if not, the seller to pay the difference between the actual premium paid and the premium ruling for vessels of A 1 Lloyds or equivalent classification.

RULE 3.—F. O. B. VESSEL. *(Free on board vessel)*. Under an F. O. B. sale,

SELLER MUST:

1). Carry goods to named embarkation point at his own expense.

2). Load goods on board vessel and pay loading charges, harbour dues and all port charges at point of loading, also export taxes (if any), and any other local or governmental duties, charges or assessments levied on goods prior to actual loading on board vessel.

3). Export charges: such as making out export declarations are paid by the seller and normally included in the price of the goods.

4). Establish all necessary consular invoices, certificates of origin, certificates of health and such other documents as may be required by the Authorities of the country of destination,—but the cost thereof is for account of the Buyer, unless specifically stated otherwise in the contract.

5). Provide usual "clean" "on board" Ocean going vessel bill of lading.

6). Be responsible for all loss/damage until goods are placed on board vessel.

BUYER MUST:

1). Charter vessel, or reserve space on board vessel.

2). Notify seller of name of vessel, or steamship line, to which delivery is to be made, within a reasonable time after notification by Seller that goods are ready.

3). Be responsible for all loss or damage after goods have been placed on board vessel.

RULE 4.—F. A. S. *(Free alongside steamer)* (named embarkation point). Under an F. A. S. sale.

SELLER MUST:

1). Carry goods alongside vessel at his own expense.

2). Goods must be placed under ship's tackle either on wharf, or, if vessel cannot come alongside, on lighters.

3). Be responsible for all loss or damage until goods are delivered alongside vessel, or on wharf under ship's tackle.

4). Provide usual dock or Mate's receipt.

BUYER MUST:

1). Load goods on board vessel and pay loading and port charges.

2). Be responsible for all loss or damage from time goods are delivered alongside vessel, or wharf.

RULE 5.—EX DOCK. Goods sold Ex Dock are at the risk of the buyer as soon as cleared through Customs, placed on the dock free of all

charges to the buyer, and delivery-order is tendered. Any loading, cartage, or other charges, and all risks after delivery-order is tendered are for account of the Buyer.

RULE 6.—EX WAREHOUSE. Goods sold ex warehouse are at the risk of the Buyer as soon as negotiable warehouse receipt, or delivery-order is tendered, and insurance risk up to time of such tender is for account of the Seller.

RULE 7.—F. O. B. CARS. (Name of departure point). Seller must load goods on or in cars, or trucks, secure carrier's bill of lading and be responsible for all loss or damage until goods are placed on/in cars or trucks at named departure point, and clean bill of lading is furnished by carrier. All further risk is for account of Buyer.

RULE 8.—DELIVERED. (Point of destination). All risks and expenses until arrival at point of destination are for account of Seller.

TIME OF SHIPMENT

RULE 9.—SPOT SALES. Under spot sales, delivery-order shall be despatched to Buyer within one full business day from date of sale.

RULE 10.—IMMEDIATE SHIPMENT. Shall be within five full business days from date of sale (date of sale excepted) on transactions for shipment within the United States, or to/from Canada, Cuba and Mexico.

On Transactions for overseas shipment, it shall be within ten full business days from date of receipt of order (day of receipt excepted).

RULE 11.—PROMPT SHIPMENT. Shall be within ten full business days from date of sale (date of sale excepted) on transactions for shipment within the United States, or to/from Canada, Cuba and Mexico.

On transactions for overseas shipment, it shall be within twenty full business days from date of receipt of order (day of receipt of order excepted).

RULE 12.—OTHER SPECIFIED SHIPMENTS. Shall be as per contract of sale.

RULE 13.—SPREAD DELIVERIES OR SHIPMENTS. When a specific quantity of merchandise is sold for delivery/shipment spread over a certain period, Buyer agrees to accept, and Seller agrees to make shipment/delivery in approximately equal monthly quantities, unless expressly stated otherwise in the contract.

RULE 14.—DATE OF SHIPMENT. The date of the Ocean on board bill of lading and/or railroad bill of lading will be evidence of time of shipment.

SHIPPING

RULE 15.—SELLERS' FAILURE TO SHIP. Should seller fail to ship within contract period, unless for reasons provided for in these Rules, Buyer may after five days' notice (Saturday afternoons, Sundays and Holidays excepted) from receipt of Sellers' telegraphic notice of inability to ship, either purchase for Sellers' account through a reputable broker, or cancel that portion of the contract on which the Seller has defaulted, and all losses by market difference and expenses incurred in connection with such default to be for Seller's account.

RULE 16.— SHIPPING INSTRUCTIONS

a). On sales for *immediate shipment* or *spot delivery* complete instructions must be given by the buyer forthwith by telegram.

b). On sales for *prompt shipment* instructions must be given by buyer by telegram within 48 hours.

c). On sales for shipment *during a specified period* buyer must give complete instructions not later than five days after first day of shipping period.

d). On sales of merchandise originating in *Overseas Countries* buyer must deliver shipping instructions to seller not later than one day before the expected berthing of carrying vessel. Failure to do so renders buyer liable for demurrage and other expenses as a result thereof.

e). On sales for shipment at *buyers' option* within a stated period, Buyer must give seller seven days' notice of his requirements accompanied by complete shipping instructions. If buyer fails to do so, seller must not be responsible for failure to make delivery within contract period. If buyer fails to furnish seller with his requirements and shipping instructions during the contract period, seller may cancel or sell for buyers' account on 48 hours' notice of such intention, holding buyer for difference in value and all expenses.

If delivery or shipment is at *sellers' option* within a stipulated period, seller may demand of buyer upon seven days' notice buyers' requirements and shipping instructions. If buyer fails to furnish seller with such requirements and instructions at the expiration of this seven days' notice, seller may cancel or sell the merchandise for buyers' account, upon 48 hours' notice, holding the buyer for difference in value and expenses.

RULE 17.—FAILURE TO GIVE SHIPPING INSTRUCTIONS. If buyer fails or declines to give shipping instructions within stipulated time as provided in RULE 16, seller may on 48 hours' notice (Saturday afternoons, Sundays and Holidays excepted) either cancel contract to the extent of the goods involved, or sell through a reputable broker for buyers' account, or make shipment as provided in the contract. Buyer shall be liable for all loss and expenses incurred as a result of such failure to give shipping instructions.

RULE 18.—ROUTING. On sales made F. O. B. carrier Port of Entry, seller has option of selecting initial line but shall, when possible, recognize routing named by buyer. When goods are sold "delivered", seller shall have option to select entire routing. When goods are sold F. O. B. Port of Entry for transhipment by all-rail, rail and water, or all-water route, and after arrival at Port of Entry it be impossible to observe buyers' routing instructions by reason of inability of carrier to furnish equipment, or if shipment is refused by carrier on account of strike, railroad embargo, or Governmental regulations, or inability to obtain vessel space, Seller shall notify buyer, and in the absence of immediate instructions to ship by another open route, or to store goods for buyers' account, seller shall be privileged to ship by an open route at equivalent freight rate.

RULE 19.—ABSORPTION OF COST OF LADING CARS. Where merchandise is sold F. O. B. cars, and buyer orders the merchandise shipped to a point not within the territory covered in the railroad's absorption tariff, then the buyer shall pay the cost of loading cars not absorbed by the railroad.

RULE 20—STORAGE FOR BUYERS' ACCOUNT. If for any reason named in RULE 18 transhipment of goods sold F. O. B. carrier Port of Entry cannot be made, seller may then store at the expiration of the free time period allowed merchandise on the dock, making draft on buyer with weight certificate, negotiable warehouse receipt and fire insurance policy. Cost of hauling, storage and insurance and other expenses shall be for buyers' account. If merchandise be of such nature that free time is not allowed on dock, seller may store immediately as set forth above.

RULE 21.—POOL CAR SHIPMENTS. When goods are sold in less than carload quantities, to be included in one car for various buyers, seller shall have the option of forwarding car to some central distributing point, as near final destination as possible, buyer paying local freight from such distribution point to final destination.

RULE 22.—DISTRIBUTION CHARGES. If less-than-carload lot is shipped to a given distribution point (destination of carload) for the purpose of affording buyer the benefit of the carload rate of freight to such point, any expense of distribution of re-shipment shall be borne by buyer.

RULE 23.—TERMINATION OF SELLERS' RISK. Notwithstanding shipped to sellers' order, goods sold F. O. B. cars or F. O. B. vessel for transhipment at Port of Entry, are at risk of buyer from and after delivery to carrier at port of transhipment and upon issuance by carrier of bill of lading or shipping receipt.

RULE 24.—SELLER TO FURNISH INFORMATION. When merchandise is sold F. O. B. for a specific time of shipment, seller shall

furnish buyer on request within 48 hours, and in all events within seven days after date of shipment, the car numbers, initials and date of shipment. This shall not deny the seller the right of substitution, provided all other terms of the contract are observed.

RULE 25.—ACCOMMODATION TO BUYER. When buyer requests seller to perform service outside of contract requirements, seller shall not be responsible for any error made in carrying out buyers' instructions. In undertaking such work for account of buyer, seller is merely acting as agent without liability.

RULE 26.—DECLARATION OF VESSEL. When contracts stipulate that shipments are to be made from foreign countries or American Colonies or dependencies, declaration shall be made by seller within forty-eight hours of receipt of mail or cable advices of shipment. If shipment or part thereof be lost, contract shall be void for the portion lost if name of vessel has been declared by seller and satisfactory proof of shipment from abroad has been submitted to buyer. If a shipment or part of same is lost before seller has, through delay in cables or mails or from other causes beyond his control, received advance advice of shipment, seller shall be relieved from making declaration as regards that portion of the contract.

If, after declaration having been passed, vessel is lost before reaching loading port, the time of shipment shall be extended for not exceeding thirty days, after which the buyer shall have the option of further extension to be agreed upon, or to cancel the contract for the portion of contract so affected. Buyer to declare such option immediately upon receipt of advice that shipment cannot be made during the extended time.

Should vessel arrive before declaration has been made and extra expense been incurred through these circumstances, such expenses are to be borne by seller.

RULE 27.—CHANGE IN FREIGHT RATE AND TAX. Any change in rail freight rate from Port of Entry and/or rail shipping point and tax thereon, after date of contract, shall be for account of buyer, unless otherwise specified in the contract.

RULE 28.—VARIATION IN QUANTITY "FULL CARGO". When a sale is for a full cargo (estimated at a certain number of tons) per vessel named by seller and accepted by buyer, the estimate shall be held to be an appropriation only, and the contractual obligation as to quantity shall be "full cargo", and seller must deliver and buyer must accept the quantity shipped in vessel named.

The quantity deliverable shall be within five per cent (5%) of the estimated contract quantity. Any excess or deficiency beyond this five per cent to be settled for at the C. I. F. price on date of vessel's arrival; this value to be fixed by arbitration, unless mutually agreed upon between buyer and seller.

RULE 29.—VARIATION IN SPECIFIC QUANTITY SALES. Where not otherwise provided in Uniform Contracts, seller shall have the option of shipping five per cent (5%) more or less of the specified quantity, such surplus or deficiency to be settled as follows: on the basis of the weight delivered up to three per cent (3%) at contract price, and any excess or deficiency beyond this 3% at the C. I. F. price of the day of vessel's arrival at port of discharge; this value to be fixed by arbitration, unless mutually agreed upon between buyer and seller. Where merchandise is shipped in packages such as: bags, bales, cases, barrels, drums, etc., the quantity shipped must be within 1% more or less of the amount contracted for.

On sales of VEGETABLE OILS shipped IN BULK the settlement shall be made on the basis of net landed weight 5% more or less, and provided that any quantity lost through leakage, and recoverable under special insurance, shall be considered as "landed."

Each shipment to be regarded as a separate contract.

If oil is sold F. O. B. tank cars and contract calls for delivery of a given number of tank cars, the exact number of cars must be delivered.

RULE 30.—MINIMUM CARLOAD. Shall be as provided for by Railroad tariff and/or other regulations as in force on date of contract, and any changes in the minimum shall be for buyers' account.

RULE 31.—DIVERSION AND OTHER ACCOMMODATIONS. When buyer requests seller to divert shipment, or to make collections from other parties, or to perform other accommodations not provided for in contract, seller shall not be responsible for any error made in carrying out buyers' instructions. In undertaking such work for account of buyer, seller is merely acting as agent without liability or without compromising sellers' rights under the contract. Seller shall be privileged to make delivery by presentation of exchange bill of lading provided same shows that original bill of lading was dated within contract time.

RULE 32.—PARTIAL LOT SALES. If quantity sold is part of a larger parcel no distinction such as by mark, lot number, etc., shall be deemed necessary. All damage, sweepings, excess or deficiency shall be pro-rated as nearly as practicable.

RULE 33.—LOSS OF SHIPMENT. Should shipment, or any portion thereof, be lost, contract to be void to the extent of such quantity.

RULE 34.—SPLIT CARLOADS. Deliveries against sales ex dock or ex warehouse, shall be made in not less than carload lots. If carload lots or parcels are split by seller for his convenience, additional freight or expenses shall be for account of seller.

RULE 35.—SUBJECT TO SAMPLE RULES. When merchandise is sold on regular grades and types established, or when sold with a

specific guarantee, or when sold on sample, buyer may reject if the merchandise does not conform to contract requirements, except as otherwise provided in these Rules.

When spot lots are sold on sample, permitting of the immediate verification of the actual merchandise by the buyer, and selling sample is not expressly guaranteed to represent the merchandise, there shall be no sale if goods do not conform to sale requirements.

In all other cases, delivery shall be taken by purchaser if merchandise be good merchantable, at a proper allowance to be fixed by arbitration.

RULE 36.—SELLERS' FAILURE TO ANALYZE THE TENDER. Seller may ship from point of delivery without the formality of tender of analysis, but in such case guarantees the quality at United States or Canadian destination.

RULE 37.—SAMPLING OF PACKAGES. Sampling shall be from 10% of packages and in such a manner as to prevent the introduction of dirt and moisture. Buyer or seller may demand the sampling of more than 10% of the packages, or may demand more than one sampling, at the expense of the party making the demand. If an unusual proportion of moisture or other foreign substance is found, and buyer and seller fail to agree upon the percentage to be sampled, the Board of Arbitration may order samples drawn at its discretion.

RULE 38.—SAMPLING. Unless otherwise provided for in the contract, sampling and analysis on oils shall be performed in accordance with the Rules and prescribed methods of the Society of American Oil Chemists in effect at the time of signing the contract.

Analysis on Concentrates shall be performed in accordance with Rules and prescribed methods of the Association of Official Agricultural Chemists, in effect at the time of signing the contract.

RULE 39.—BUYERS' OBLIGATION TO TAKE DELIVERY. When buyer claims allowance only, he shall take delivery of goods and pay for same, and if required by buyer, seller shall furnish bond or bank guarantee to pay promptly any refund agreed upon or allowed buyer by arbitration. Failure of the buyer to take delivery or to furnish shipping instructions as called for in these rules shall render him liable for all losses and/or expenses incurred.

RULE 40.—SEPARABLE LOTS. Each shipment or delivery shall constitute a distinct and separate contract, and buyer shall not be entitled to reject any undelivered portion of the goods by reason of Sellers' default as to any other portion thereof, except that: if either party admits insolvency, all deliveries called for under the contract may be closed out at fair market price, at the option of the solvent party, on due notice.

Rejection if accepted by seller shall constitute delivery.

RULE 41.—PROOF OF ORIGIN. If the genuineness of the product is questioned, the proof of place of origin and shipping documents, or certified copies of same, may be demanded from the seller by the buyer or the Arbitrators.

RULE 42.—OFFICIAL WEIGHERS AND INSPECTORS. When circumstances compel buyer to move goods in less than 48 hours, he must, in order to establish claim, employ weighers or inspectors as provided for in these Rules; and sampling, weighing and inspecting must also be done as provided for in these Rules.

RULE 43.—SAMPLING AND WEIGHING IN CASE OF DISPUTE. In case of rejection or dispute as to quality or weights or condition of packages, seller shall be notified immediately, and shall be allowed 48 hours after receipt of this notification, proper time being allowed for transmission of communication, within which to arrange for sampling or weighing or inspection. Failure of buyer to so notify seller shall constitute acceptance.

Sampling or weighing shall be done by such person or persons as may be mutually agreed upon and as provided for in these Rules.

If the seller refuses or neglects for 48 hours, after notification, to arrange for sampling or weighing or inspection as above, the buyer may appoint an official inspector or weigher of this Institute to draw samples or to weigh in the manner described in these Rules. Such official inspector or weigher will be considered the representative of both the buyer and seller.

If sampling or weighing has to be done at a place where no official inspector or weigher appointed by the Institute is available, then buyer may appoint a representative of any other Commercial Body, or recognized competent inspector, weigher or sampler, and when such samples or weights are submitted with proper affidavit as to all material facts establishing the identity and the condition of the merchandise, such returns shall be considered authentic.

RULE 44.—EXPENSES PAID BY PARTY AT FAULT. In case of claims, all necessary expenses incident to the controversy to be borne by the party found at fault. This rule is not to prejudice the assessment of costs in cases submitted to arbitration.

RULE 45.—TARIFF AND CUSTOMS CLASSIFICATION. All sales are based upon United States tariff and customs classifications, excise, and other United States Governmental tax in force at time of signing contract, and any change therein, or the imposition of duty, or any other taxes of any kind whatsoever on goods previously free, or Government and/or State tax shall be for buyers' account. Seller shall not be responsible for consequences arising from unforeseen administration customs regulations.

The containers of goods shipped from Foreign Countries or United States colonies, dependencies or territories must bear, as prescribed by the U. S. Tariff Act, the name of the country or origin, such as: "Produce of . . . . . ". Penalties exacted by the U. S. Government for lack of such proper marking shall be at the expense of the seller/shipper.

RULE 46.—SETTLEMENTS. Unless otherwise specified, settlement of contracts shall be based on DRUMS of 400 lbs. net, or BARRELS of 375 lbs. net. Tank Cars of 6,000 gallon capacity on the basis of 45,000 lbs. net; 8,000 gallon capacity on the basis of 60,000 lbs. net; and 10,000 gallon capacity on the basis of 75,000 lbs. net. Other packages will be based on the custom of the trade. It is understood that a tank car must be loaded to shell capacity.

RULE 47.—WEIGHTS. Certified public weighers' certificate and/or (at sellers' option) T. C. F. B. and/or authorized Territorial Weighing and Inspection Bureau weights at Port of Entry to be final.

RULE 48.—GOVERNMENT TESTS. Whenever goods sold are required to pass United States Government test or analysis, and fail to do so, seller has the option of substituting other goods conforming to contract, provided shipment is not delayed more than 60 days beyond original contract period. With consent of seller, buyer may at his option take delivery of goods and recondition same sufficiently to pass said test or analysis. The cost of such reconditioning to be mutually agreed upon between buyer and seller and to be for account of the seller.

RULE 49.—PLACE OF CONTRACT. Unless expressly agreed upon between buyer and seller, a contract covered by these Rules is assumed to have been made in the State where it is signed by the Seller.

RULE 50.—PAYMENT. In currency of the United States of America.

RULE 51.—PAYMENT AGAINST DELIVERY ORDER. When contract provides for payment in exchange for delivery order, such delivery order shall not be tenderable until goods have arrived.

RULE 52.—EXAMINATION AND APPROVAL. If sale is made subject to examination and approval on arrival at destination, and shipment is not disapproved within three full business days after arrival, contract shall be considered fully complied with on sellers' part.

If delivery is against a C. I. F. or F. O. B. or any other form of delivery covered in these Rules, and buyer fails to file notification of claim or rejection of the merchandise within five full business days after same shall have been made available for his inspection and sampling, such failure shall relieve seller of further responsibility under the contract as far as quality is concerned.

RULE 53.—BETTER THAN CONTRACT QUALITY. Seller shall have the option of delivering against contract, merchandise of a

higher grade than sold, provided it is of substantially the same components as the merchandise contracted for and has not been manipulated or modified in such a manner as to interfere with its use in place of the contracted goods.

RULE 54.—PRESENTATION OF DOCUMENTS. Where contract covers a commodity requiring shipment from one point to another within the United States, seller shall make presentation of covering documents to the buyer not later than twenty-one days after date of bill of lading: provided that, should merchandise reach destination, and seller does not present documents or arrange for release of goods within two calendar days thereafter, seller shall be responsible for any demurrage, car rental, storage, and other charges resulting therefrom. If the full period of twenty-one days shall have expired without seller presenting documents or arranging for release of goods, buyer may demand the documents, and if seller still fails to furnish same, or arrange for release of the goods, within forty-eight hours, Sundays and legal holidays excepted, after such demand is made, Buyer may, at his option, cancel that portion of the contract or buy in the merchandise for account of seller. Buyer must advise seller immediately which option he wishes to exercise, and should he elect to repurchase he must notify seller immediately of the repurchase price.

All documents required by the Government at Port of Entry—and which are specified in the terms of sale—must be supplied in good order and complete by the seller. Should documents, on arrival, not be complete and in order, and as a result thereof clearance of the merchandise be refused by the Government at Port of Entry, seller has three weeks' time in which to rectify and/or complete these documents, and during this time all demurrage and other expenses will be for sellers' account. If after three weeks such documents are not yet available at Port of Entry in proper and complete form, buyer may, upon notification to seller, reject the goods tendered as not conforming to conditions of sale and, at his option, cancel the contract for the portion so affected or buy in the open market for buyers' account such portion affected, and seller will be liable to buyer for eventual market difference plus all expenses accrued against the rejected goods.

RULE 55.—TENDERS. On sales between parties located in the United States and/or Canada tenders made between 9 A.M. and 5 P.M., and between 9 A.M. and 12 noon on Saturdays (Sundays and holidays excepted) shall constitute delivery unless rejected within 48 hours from tender or delivery of sample to buyer, or buyer's agent, at point of tender (Saturday afternoons, Sundays and holidays excepted). If buyer be a non-resident at point of delivery, he shall designate to seller, prior to contract period, the name of his resident representative qualified to accept service of tender. If buyer fails to designate his represntative to whom tenders shall be made, seller has the right to load and ship the merchan-

dise, having at least three samples drawn by licensed sampler, which sample shall be final. One sealed official sample shall be held by licensed sampler for at least 90 days.

Failure to reject a tender within 48 hours after sampling (Saturdays, Sundays and holidays excepted) shall constitute an acceptance of tender by buyer, except that: when tenders are made at points where no licensed inspector and/or Chemist of the Chamber of Commerce or Society of American Oil Chemists are located, buyer cannot be held to the foregoing time allowance, but must be given an opportunity to verify quality by promptest other means available.

When a rejection is uncontested by the seller, or is sustained as a result of arbitration, seller shall have the original contract shipping/delivery period within which to tender other lots.

RULE 56.—LETTER OF CREDIT. When terms of sale provide for payment under letter of credit, buyer shall establish an irrevocable bankers' credit in favour of seller in an amount sufficient to cover the value of the maximum quantity that seller may deliver under the contract.

Such credits shall be established:

a) for shipments to be made within 30 days from date of sale: by cable within five days from date of sale.

b) for shipments to be made within 60 days from date of sale: within five days from date of sale but to be notified by the first following air mail, or within thirty days from date of sale by cable/telegram.

c) when terms of sale of merchandise by a seller in the United States to a buyer in the United States stipulate payment under letter of credit (domestic letter of credit), the buyer shall establish an irrevocable bankers' credit in favour of seller within five (5) days from date of sale (Sundays and holidays excepted).

The expiry date shall be: at least fifteen days beyond the latest contract shipping date, when issued directly in favour of an overseas shipper (overseas letter of credit), and at least thirty days beyond the latest estimated time that goods may arrive at Port of Entry, when credit is issued in favour of United States seller (domestic letter of credit).

The expiry date of a domestic letter of credit covering goods originating in the United States shall be fifteen days beyond the latest contract shipping date.

Letter of credit shall provide for payment against surrender of documents which must conform to the contract stipulations, except that: a domestic letter of credit shall further provide alternative instructions to the Bank authorizing negotiation of sellers' draft thereunder if accompanied by negotiable warehouse receipt and fire insurance policy, in lieu of bill of lading, provided seller attaches to the draft an affidavit that goods were warehoused for buyers' account because of reasons as enumerated in Rule 20.

RULE 57.—EXTENSION OF LETTER OF CREDIT. If for reasons beyond sellers' control, as provided in these Rules, seller is unable to negotiate drafts under letter of credit prior to the expiry date, buyer, immediately upon receiving evidence that delay in shipment was occasioned by reasons beyond sellers' control, shall either establish a new credit or extend the expiry date of the original credit for a period equal to the time lost on account of such contingency. If delay exceeds thirty days, the buyer has the option of extending the expiry date or of cancelling as provided in Rule 58.

RULE 58: CASUALTY CLAUSE. In the event of War, Blockade, Prohibition of Export, or other Acts of Governments, Rulers, Princes or Peoples, preventing shipment, the contract so affected, or any unfilled part thereof, shall be cancelled.

Should shipment be delayed by: fire, strikes, lockouts, riots, rebellion, civil commotion, Act of God, or any other contingency beyond sellers' control, or in the event of the vessel named to carry goods under contract should be lost before or in the course of loading, the time of shipment shall be extended for thirty days. However, should the delay exceed thirty days, the Buyer shall have the option of accepting the goods for shipment as soon as possible, or during a period mutually agreed upon, or of cancelling the contract, but buyer must declare his intention not later than ten days after receipt of sellers' advice of inability to ship within the extended period.

The seller must produce good and satisfactory evidence of the existence of the disabling circumstances, such evidence to be attested by a United States Consular Officer in all places where a United States consulate is maintained, or by a local authority if no United States consulate is maintained.

If sale is made for shipment by a specified vessel, or if seller has declared his arrangements for shipping by a specified vessel, and such vessel, through Act of God, perils of the Sea, or other causes of "Force Majeure" fails to arrive at loading port for shipment within contract time, the time of shipment will be extended until such vessel is able to load, but such extension shall in no case exceed thirty days; if the delay exceeds thirty days the contract shall be cancelled. Seller must advise the buyer of the disabling contingency as soon as known. The seller, however, is privileged, if circumstances permit, to substitute another vessel of like classification loading within contract shipping time and following the same routing, in which case he must advise buyer immediately of the substitution. The seller must submit good and satisfactory proof of having contracted for the space and also of the causes of delay—attested by a United States Consular Officer, or by a local Authority if no U. S. consulate is maintained.

If sale is made for shipment by a specified vessel to be furnished by the buyer, and such named vessel, through Act of God, perils of the Sea, or other causes of "Force Majeure" fails to arrive at loading port within

contract time, the buyer will have the option of substituting another vessel to load within contract shipping period or, if none available, the buyer will have thirty days in which to berth the originally named vessel (if not lost), or another vessel, and the Seller will have to deliver the contracted for goods to such vessel without extra charge for warehousing pending shipment.

If no berthing arrangements are made by the buyer within the extended period of thirty days, the seller has the option of cancelling or closing out at a fair market price, and any loss through market difference will be at the charge of the buyer.

RULE 59.—INSURANCE. On C. I. F. sales seller shall furnish Marine Insurance Free of Particular Average for the C. I. F. invoice value of the goods plus 10%, also risks on wharfs and/or docks and/or lighters and/or other conveyances, until delivered at consignees warehouse and/or elevator within the limits of the port of discharge, for a period of not over fifteen days after final discharge from vessel.

For certain commodities, the Special Rules provide for special insurance coverings. Buyer and seller, by mutual agreement, may stipulate such forms of insurance as fit their understanding.

ALL INSURANCE SETTLEMENTS TO BE MADE AND PAYABLE IN THE U. S. A. IN U. S. CURRENCY.

RULE 60.—BANKRUPTCY. If, before the fulfillment of contract, either party shall suspend payment or become bankrupt or insolvent, all deliveries under contract may be closed out at fair market prices, or the contract may be cancelled, at the option of the solvent party, on 48 hours' notice.

RULE 61.—IMMEDIATE REPLY. Reply must be received by party making firm bid or firm offer within two hours after time message conveying such firm bid or firm offer is filed with the telegraph company.

RULE 62.—PROMPT REPLY. Reply must be received by party making bid or offer by 5 P.M. the same day. Overnight bids made or offers received must be answered by telegraph before 10 A. M. the following day, sender's time.

RULE 63.—DELIVERY AND DESPATCH OF TELEGRAMS. In case of dispute the delivery of telegrams shall be based upon the time at which the telegrams are delivered by the telegraph company, as shown by its records, and the time of despatch of telegrams shall be based upon the time filed with the telegraph company as shown by its records.

RULE 64.—Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products.

RULE 65.—When arbitration under these rules is applied for by either party to a contract such arbitration shall, in the absence of agreement to the contrary, be held before a committee appointed for the matter by the San Francisco Chamber of Commerce. Such arbitration will be held at the San Francisco office of the San Francisco Chamber of Commerce, under the rules of the National Institute of Oilseed Products.

RULE 66.—All communications relative to arbitration shall be addressed to the San Francisco Chamber of Commerce.

RULE 67.—Three arbitrators shall serve on each case and the agreed decision of any two shall be binding on all parties. The dissenting arbitrator shall, however, sign as dissenting thereto and may give reasons therefor.

RULE 68.—The following is the form of request for arbitration:

"The undersigned hereby requests that an arbitration be held before a committee appointed for the matter by the San Francisco Chamber of Commerce, and under the rules of the National Institute of Oilseed Products, in the matter of

....and hereby agrees and promises to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the rules of said Institute. Arbitrators may be appointed and proceed without notice.

"Check for $50.00 for deposit on account of said arbitration fee enclosed herewith.

(signed)______________________________

By______________________________"

RULE 69.—The fee in all cases of arbitration shall be $50.00, which amount shall be deposited with the San Francisco Chamber of Commerce by each party together with application for arbitration, but the party in whose favour decision is rendered shall be entitled to a return of his deposit when the findings are forwarded to him.

RULE 70.—The arbitrators shall receive for their services from the San Francisco Chamber of Commerce such portion of the arbitration fee as the Chamber may provide.

RULE 71.—Written statements of fact, together with written arguments thereon, must be presented in quadruplicate to the San Francisco Chamber of Commerce, which shall be submitted in their entirety to the arbitrators, but no oral evidence shall be given or personal appearance of the parties permitted unless requested by the arbitrators.

RULE 72.—Immediately upon receipt thereof, the Chairman of the Chamber of Commerce shall submit a copy of the statement of fact to the respective parties to the arbitration, and each shall have the right to reply thereto, but if no such answer is made by either party within a reasonable time, it shall be considered a waiver of the right to answer.

RULE 73.—Sample, if required, shall be drawn and forwarded to the Chamber of Commerce in accordance with the Rules covering the commodity in dispute. In the event parties to an arbitration disagree as to the sample or samples to be used for arbitration, the arbitrators shall obtain same in such manner as they shall elect. The losing party shall bear any and all expenses connected with taking and forwarding samples.

RULE 74.—The findings and award of the arbitrators shall be in writing, signed by the arbitrators, fully setting forth the facts of the case and a copy thereof shall immediately be furnished the parties to the dispute.

RULE 75.—When arbitration finding is based upon samples, the samples on which arbitration was held shall, on immediate request, be returned to the owner at his expense.

RULE 76.—A member of the Institute, unless acting as agent for a disclosed principal, who refuses to submit to the San Francisco Chamber of Commerce any dispute arising out of a contract providing for arbitration under the Rules of the Institute, or who fails or refuses within reasonable time to abide by the findings and award of the arbitrators, shall be reported to the Board of Directors of the National Institute of Oilseed Products, who shall have power to act in such manner as the facts warrant, and may suspend or expel such member, reporting such action to the membership.

RULE 77.—COMMODITIES NOT COVERED BY SPECIAL RULES. Any commodities not specifically provided for in these Rules shall be treated according to the custom and usage of the trade. Provided that these General Rules shall govern insofar as applicable to the transaction.

RULE 78.—When Uniform Contracts have been approved and accepted by members of the National Institute of Oilseed Products the Institute will recognize no deviation or change in these contracts as pertains to Rules: 28, 29, 100, 101, 102, 103, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150 and 152.

SPECIAL RULES

COPRA

RULE 100.—DESCRIPTION AND QUALITY. Copra shall be the product from matured cocoanuts; shall be "fair merchantable" quality. According to the terms of sale it may be either: sundried, smoke dried, hot air dried, or mixed.

"Fair merchantable" copra shall be free from a noticeable admixture of copra from unripe nuts (Cocomoda), free from dirt and foreign substances. It shall not have suffered deterioration through storage.

The free fatty acids contents should not exceed 5%, and the resultant oil shall in no case be of a deeper color than 50 yellow and 9 red Lovibond Scale.

Having regard for occasional uncommon conditions of production and shipping, a tolerance of 1% free fatty acids contents will be admitted. However: if the free fatty acids contents exceed 6%, the seller shall make an allowance to the buyer of ½ of 1% of the invoice value for each 1% free fatty acids over 6%, fractions in proportion, up to and including 8%. If the free fatty acids contents exceed 8%, the seller shall make an allowance to buyer of ¾ of 1% of the invoice value for each 1% free fatty acids in excess of 8%, fractions in proportion, up to and including 10%. If the free fatty acids contents exceed 10%, the seller shall make to buyer an allowance of 1% of the invoice value for each 1% of free fatty acids in excess of 10%, fractions in proportion, up to and including 12%. If the free fatty acids contents exceed 12%, the delivery will be rejected as unmerchantable, but the buyer may exercise the option of accepting delivery at an allowance agreed upon between buyer and seller which—in no case—shall be less than the penalty established for 12% free fatty acids Copra.

RULE 101.—For the purpose of establishing quality all copra shipments shall be sampled at all United States Pacific Coast Ports officially by Messrs. CURTIS & TOMPKINS Ltd., licensed surveyors and chemists, whose sampling and analyses shall be official and binding upon both buyer and seller.

The cost of this official sampling is fixed at 8 U. S. cents per ton, buyer and seller each paying half of the cost of this sampling.

RULE 102.—QUANTITY: shall be long tons of 2240 pounds. Seller has the option of delivering 5% more or less of the contracted quantity, such surplus or deficiency to be settled as follows: on the basis of the delivered weight up to 3% at contract price, and any excess or de-

ficiency beyond this 3% at the market price of the day of arrival at Port of Discharge, this market price to be fixed by the Executive Committee of the National Institute of Oilseed Products.

SEEDS AND NUTS

Rule 103.—DESCRIPTION AND GRADE

Palmkernel: (Named country of origin) The kernels are to be of good merchantable quality, F. A. Q. of season at time of shipment. If inferior thereto a fair allowance shall be made as ascertained in the usual way by cutting.

Any deficiency in Oil Contents of the kernels shall be allowed for by sellers, and any excess shall be paid for by buyers on the basis of 1½%, on the contract price per ton for each 1% under or over 49% or proportionately for any fraction thereof. An average sample in triplicate shall be taken and sealed up conjointly by buyers' and sellers' representatives at port of discharge before delivery, and sent to ________________ a certified public chemist who shall be a member of the American Oil Chemists Society, who upon such sample (or samples) shall determine by petroleum ether the percentage of oil contents. In the case of kernels damaged by water, samples of wet kernels shall be drawn in sealed bags in the usual way for arbitration and, if required by either party, duplicate samples of such wet kernels shall be drawn in sealed bottles to be tested by a certified public chemist who shall be a member of the American Oil Chemists Society for moisture content solely for the information of the arbitrators. The sample (or samples) when delivered to the certified public chemist to become their absolute property; the charges for sampling and analyzing to be divided between buyer and sellers.

Babassu (Nut) Kernels: Babassu Nut Kernels shall be sold for delivery in sound merchantable conditions, and to be F. A. Q. of the current season's production and shall be commercially free of shells and foreign matter.

Tucum: Tucum Nut Kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production and shall be commercially free of shells and foreign matter.

Coquito: Coquito Nut Kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production, and shall be commercially free of shells and foreign matter.

Cohune: Cohune Nut Kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production, and shall be commercially free of shells and foreign matter.

OURICOURY: Ouricoury Nut kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production, and shall be commercially free of shells and foreign matter.

MURU MURU: Muru Muru Nut Kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production, and shall be commercially free of shells and foreign matter.

UCUHUBA: Ucuhuba Nut Kernels shall be sold for delivery in sound merchantable condition, and to be F. A. Q. of the current season's production, and shall be commercially free of shells and foreign matter.

MANCHURIAN HEMPSEED: The seed to be delivered to port of embarkation in merchantable condition, of the fair average quality of the season at time and place of shipment and warranted to be equal to the average for the month in which the seed is shipped, but not to contain more than 10 per cent moisture at time of loading on ocean-going vessel. Lloyds certificate as to quality and moisture content to be furnished by the seller. In the event of no average being made the arbitrators shall decide what is the fair average quality.

Should the seed on arrival at port of discharge not prove equal to the above warranties, be sea or otherwise damaged, or out of condition, this contract is not to be void, but the seed as well as the sweepings, is to be taken, with an allowance, to be fixed by agreement or by arbitration, as provided under these rules.

Any excess of admixture over 3 per cent shall be deducted from the contract price.

CHINESE RAPESEED—PURE BASIS: The seed is to be deliver at port of shipment in sound and merchantable condition, subject to any country damaged grains, and is warranted to be of the fair average quality of the season at time of shipment, such average to be decided by the standard average for the month in which the seed is shipped.

The percentage of admixture having been ascertained, non-oleaginous substances shall be considered valueless. The basis shall be pure rapeseed and the buyer shall receive an allowance equal to the percentage of admixture as ascertained. When the admixture is over 3%, the excess of 3% shall be doubled.

PERILLA SEEDS: Perilla Seeds shall be sold for delivery in sound merchantable condition, F.A.Q. of the current month's shipments, but not to exceed 8% moisture at time of loading on board ocean-going vessel. The seed is to be basis 94% pure, any impurities over 6% considered worthless and to be refunded at contract price.

LINSEED: On Linseed contracts the rules of the Linseed Association of New York are hereby adopted and made a part of the rules of the National Institute of Oilseed Products.

CASTOR SEEDS: Castor seeds are sold basis pure or 98% pure, as per arrangement, and for delivery in sound merchantable condition, F.A.Q. of season. All impurities including oleaginous admixture to be considered valueless. American Oil Chemist Society, or The Linseed Association of New York approved chemist's analyses to govern as regards admixture and impurities.

GROUND NUTS (PEANUTS): Ground nuts are sold basis pure for delivery in sound merchantable condition, but shall not contain over 8% moisture at time of shipment and to be F. A. Q. of season. All admixture to be considered valueless. American Oil Chemist Society Chemist's analysis to govern as to admixture.

MANCHURIAN SOYBEANS: The beans to be sold for delivery in sound merchantable condition, of the fair average quality of the season and warranted to be equal to the standard average for the month in which the beans are shipped.

CHINESE SESAME SEED: The seed is to be delivered in sound merchantable condition, subject to any country damaged grains in the Standard and is warranted to be of fair average quality of its description at time and place of shipment, such average to be decided by the standard average for the month in which the seed is shipped and to be free from musty smell subject to the usual slight earthy Chinese smell.

The basis shall be 98% pure. Impurities in excess of 2% considered valueless and to be refunded at contract price.

KAPOC SEEDS: Kapoc seeds shall be delivered in sound merchantable condition, not to exceed over 25% immature seeds, and to be F. A. Q. of the season.

SEEDS AND NUTS

NOTE: *These rules covering seeds and nuts are in addition to the general rules. Specific commodity rules supersede conflicting general rules.*

RULE 104.—DESCRIPTION OF GRADE. The description and grade of all seeds and nuts covered under these rules shall be as set forth under their description in the Special Rule No. 103.

RULE 105.—WEIGHTS. Certified public weigher's certificate and/or Transcontinental Freight Bureau weights at port of discharge will be final.

RULE 106.—STORAGE FOR BUYER'S ACCOUNT. If transfer at port of entry is delayed by buyer's failure to give forwarding instructions prior to arrival, or by reason of inability of railroads to furnish equipment, or if shipment is refused by carriers on account of railroad embargoes or Governmental regulations, buyer agrees to accept delivery ex wharf, and the goods are to be stored at buyer's expense in public warehouse, for buyer's account and risk, and paid for by sight draft attached to negotiable warehouse receipt and ex ship weight certificate. When seeds or nuts are sold in bulk and railroad cars are not available, seller shall have the option of packing in bags at expense of buyer. Before bagging and/or storing copra seller must first give buyer the opportunity of selecting warehouse and/or arranging the storage and/or bagging.

RULE 107.—LONG TONS. Unless otherwise specified it is understood that long tons of 2240 pounds are intended.

RULE 108.—PRICE IN BAGS. When price is made for merchandise in bags, it shall be understood that price is based on gross weight less tares. Bags are free to buyer.

RULE 109.—DESPATCH DISCHARGING "FULL CARGOES" SOLD EX DOCK OR EX VESSEL. When sales of full cargoes are made ex dock or ex vessel buyer shall take delivery of merchandise at the rate of, and on the conditions as specified in the bill of lading.

VEGETABLES OILS AND VEGETABLE TALLOW

NOTE: *These specific rules for vegetable oils are in addition to the general rules set forth herein. Specific commodity rules supersede conflicting general rules.*

RULE 110.—DETERMINATION OF QUALITY. Oils or fats shall be sold quality guaranteed at point of American tender, and be unadulterated and free from substances unnatural to same, except when placed therein by any governmental authority, but such modification must be stated in the contract, and the nature of the admixtures specified.

Oils and fats must contain all their original fluid and solid fatty acids in their original proportions, and any modification must be stated in the contract.

Any claim for minor contamination must show that the physical and chemical characteristics and properties of the tendered oil have been so altered as to render it unfit for the industrial application into which the oil usually moves. The Institute recognizes the vast difference between deliberate adulteration and accidental contamination.

RULE 111.—ALLOWANCE FOR MOISTURE AND IMPURITIES. When oils are sold on the basis of moisture and impurities not foreign to the oil, a full allowance shall be made on contract price for such moisture and impurities in excess of contract stipulations.

RULE 112.—Section 1. Tares of oil in packages shall be the original marked invoice tare. In the event of tares being illegible, weighmasters may have access to the original weight certificate to determine the correct tare.

Section 2. The buyers or sellers shall be entitled to demand the stripping of 10% of the packages provided there be justification for believing tares to be excessive. The seller shall make allowance to the buyer for excess of super-tares on the following basis:

Wood barrels .... If exceeding 2 lbs. per barrel
Steel or Iron drums .... If exceeding 1 lb. per package

Section 3. Any claim for excess tares must be made within 15 days after delivery. The actual tares of packages must be ascertained by removing the head and draining the package thoroughly. The stripping must be done in warm place. The seller has the option of having a representative present during the operation. The cost of stripping shall be at the expense of the party making the demand.

Section 4. The tares of Tank cars shall be the actual scale weight of the empty tank car after being certified clean.

RULE 113.—In the absence of anything to the contrary, weighing charges shall be for the account of the buyer on C. I. F. sales; or for seller's on ex dock or F. O. B. tank car sales. Tank cars shall be disconnected when weighed.

RULE 114.—TIME OF WEIGHING. No weights shall be recognized as landed weights unless taken within five days after completion of discharge. Oil brought ex dock or F. O. B. cars shall be re-weighed when delivered if re-weight is demanded by buyer, but at buyer's expense.

RULE 115.—ALLOWANCE FOR FREE FATTY ACIDS. When oils are sold on basis of f.f.a. with an up and down allowance, such allowance shall be at the rate of ½ of 1% of the contract price for each 1% f.f.a., fractions in proportion.

RULE 116.—TANK CARS. Tank cars tendered on contracts either for loading to seller, or when loaded to buyers, must be of standard make and be so equipped as to permit ready loading and unloading in all kinds of weather.

RULE 117.—USE OF TANK CARS. The use of tank cars for any other purpose than that originally intended or for any other than the original destination by either party to a transaction, without the consent of the other party at interest, shall render the party so using such tank cars liable for all charges and demurrage accruing to owner or lessee of the cars.

RULE 118.—LIMITATION OF DESTINATION. Unless otherwise specified destination of seller's tank cars is limited to within the borders of the United States.

RULE 119.—DETENTION CHARGES FOR TANK CARS. Detention charges for the use of tank cars shall be according to the average renting value of tank cars for the period of the preceding three months and based on tanks of 8,000 gallons.

RULE 120.—DEMURRAGE. In addition to the detention charges payable to the owner or lessee of tank cars as per preceding rules, any demurrage charges assessed by transportation companies on empty or loaded cars shall be borne by the party responsible under the contract for such charges.

RULE 121.—LOADING BUYER'S TANKS. To avoid demurrage, Buyer's tank cars must be loaded by seller within 48 working hours of arrival at point of loading, when such arrival is in accordance with contract. Likewise, buyer must unload seller's tank cars within 48 working hours after arrival.

RULE 122.—RETURN OF EMPTY TANK CARS. Buyer shall respect the instruction of seller covering the handling of seller's tank cars, and in the event of re-sale shall require his consignee to return empty tank cars according to seller's instructions, furnishing seller with complete information.

RULE 123.—BUYER MUST FURNISH NUMBERS, ETC. Buyer furnishing tank cars must notify seller of correct numbers, initials, date of forwarding, and to supply proof of shipment without delay.

RULE 124.—NOTIFICATION OF SHIPMENT. Seller must notify buyer immediately of date of shipment of loaded tank cars, their numbers and initials, and furnish weight certificate showing track scale gross and tare weights, without delay.

RULE 125.—INSPECTION OF TANK CARS. Seller shall in all cases before loading tank cars *furnished by buyer,* inspect tank cars and where necessary, have them cleaned and repaired at buyer's expense if so authorized. Seller, having taken all reasonable precautions to insure cleanliness assumes no further responsibility therefor.

In the event it is impossible to clean buyer's tank cars suitably for carrying oil sold, and buyer is unable to furnish other cars before expiry of contract shipping period, seller may substitute other equipment and notify buyer.

RULE 126.—REPLACING LOST OR DAMAGED TANKS. In the event of cars being damaged or lost, buyer shall, within 48 hours after receipt of notice of such condition, forward other tank cars in substitution, advising seller of such forwarding, and such substitution of tank cars shall take the place of the original forwarding.

RULE 127.—ROUTING OF TANK CARS. On contracts calling for seller's tank cars, seller reserves the right of routing; when contracts call for buyer's tank cars, buyer reserves the right of routing.

RULE 128.—BUYER MUST NAME DESTINATION. When oil is sold upon terms of loading point within seller's option, in buyer's tanks but seller's routing, the buyer must furnish seller with destination before seller is required to name loading point, and specify routing.

RULE 129.—WEIGHTS. When goods are sold F. O. B. tank cars point of loading, certified public weighmaster's certificate, and/or weight certificate of the territorial weighing and inspection bureau having jurisdiction at point of loading will govern.

RULE 130.—TIME OF SHIPMENT. Shipments will be interpreted as follows, not including date of contract:

Quick shipment........................Within two working days.
Immediate shipment....................Within five working days.
Prompt shipment.......................Within ten working days

Except that General Rules 10 and 11 shall apply to overseas shipments.

This rule to apply on shipments of merchandise in packages or tank cars, and it is also to govern the forwarding of buyer's empty tank cars or—buyer's empty packages when contract calls for buyer's tank cars or packages.

The date the bill of lading is signed shall be considered as the date of shipment, this to apply to the shipment of the merchandise as well as to the forwarding of empty tank cars: provided, however, that in case the transportation company does not issue bills of lading for empty tanks, the shipper must nevertheless obtain from the transportation company acknowledgment of the forwarding of such empty tanks. Notice of the shipment of the merchandise as well as of the forwarding of empty tanks must be forwarded by the shipper to the other party at interest at the earliest possible date.

RULE 131.—DATE OF OCEAN GOING VESSEL and/or RAILROAD and/or CARRIER BILL OF LADING. The date of ocean going vessel and/or railroad and/or carrier on board bill of lading shall be evidence of time of shipment.

RULE 132.—CASUALTY CLAUSE. In all cases seller shall not be responsible for non-delivery or delay of delivery resulting from the acts of God, from the elements, or from the action of governments, or caused by strikes, fires, explosions, floods, war, riots, insurrections, lockouts, perils of the sea, embargoes, or contingencies in the course of oversea voyage or overland transportation; provided that seller must prove the direct operation of any alleged disabling circumstances, and must notify buyer of the existence of such circumstances as soon as known to him.

When goods are sold by a manufacturer or producer as of his own make, or when sold by a dealer as the product of a certain producer or manufacturer providing dealer can establish existence of covering contract, or when identified at the time of sale as a specific lot, the following conditions shall be considered as beyond seller's control:

Partial or total destruction of plant or merchandise from any cause; breakdown of machinery, war, strikes, riots, or any unlawful acts, as far as they will interfere with the manufacture or delivery of the merchandise: or the insolvency of the manufacturer or producer whose make is specifically designated in contract. The seller claiming exemption under this paragraph must notify buyer immediately, and be prepared to furnish proof of the direct opration of the alleged disabling circumstances enumerated above, without loss of time.

RULE 133.—PROOF OF CASUALTY. If seller claims any of the circumstances enumerated in Rule 132 as reason for non-shipment or for extension of time, seller must furnish a statement setting forth in

complete detail the existing disabling circumstances, such statement to be attested by a U. S. Consul (or proper local authority if no U. S. Consulate is maintained) when shipment/delivery was contemplated from a foreign country, or supported by affidavits made before local authority if shipment/delivery was contemplated from an American colony, dependency or Territory, or from a point within the U. S.

RULE 134.—PAYMENT. The terms of payment for oils and fats and waxes shall be cash against documents, unless expressed otherwise in contract.

RULE 135.—INSURANCE.

a). When vegetable oils are sold on "qualified C. I. F. terms", i.e: landed weight, quality guaranteed at destination, etc., the Marine Insurance provided by the seller/shipper shall cover the risk of leakage and contamination. At the port of discharge the buyer shall do all that is necessary, under the terms of the policy/certificate of insurance, to ascertain condition of the cargo, have the proper surveys made, present claims, where justified and necessary, and such claims when collected shall be credited to seller/shipper as his interest may appear.

b). When vegetable oils are sold *cost and freight* but "qualified" as to landed weight, quality guaranteed at destination, etc: or when sold on "qualified C. I. F. terms" upon the conditions that buyer will supply insurance at seller's expense, the buyer must provide insurance to cover leakage and contamination—and at port of discharge will proceed as set forth in paragraph a).

RULES GOVERNING QUALITY OF VEGETABLE OILS AND VEGETABLE TALLOW

RULE 136.—VEGETABLE OILS when sold shall be designated as hydraulic pressed, expeller pressed, or a combination of hydraulic and expeller pressed, or solvent extracted.

RULE 137.—PURE RAW SOYABEAN OIL. The standard of quality shall conform to the latest standard specifications described in Rule 2 of the National Soya Bean Processors Association.

RULE 138.—FOREIGN PEANUT OIL, FAIR AVERAGE QUALITY, CRUDE. Shall be filtered or well settled, and shall be fair average quality of the season, unless otherwise specified in the contract, with a maximum free fatty acids of 2%, and a maximum of moisture and impurities of ½ of 1%; provided, however, that oil containing over 2% and not in excess of 5% free fatty acids shall be accepted with an allowance of 1½% of contract price for each 1% free fatty acids, fractions in proportion; and further provided, that oil containing moisture and impurities over ½ of 1%, and not in excess of 1%, shall be considered as good delivery by allowance at the rate of 1% for each 1% moisture and impurities, fractions in proportion; and may be rejected if moisture and impurities exceed 1½%.

RULE 139.—COCHIN TYPE COCONUT OIL. Shall not contain more than 1/10% free fatty acids, and shall have a color no darker than 10 yellow 1 red.

RULE 140.—DOMESTIC COCONUT OIL (MANILA TYPE) CRUDE. Shall not contain more than 6% free fatty acids.

RULE 141.—CRUDE HEMPSEED OIL. Shall be fair average quality of the season's production, of the season of the country in which it is pressed, the free fatty acids shall not exceed 3%, nor moisture and impurities exceed ½ of 1%.

RULE 142.—PERILLA OIL, FAIR AVERAGE QUALITY. Guaranteed non break. Free fatty acids not to exceed 2% at time of shipment. Oriental certificate of quality to be furnished by seller and considered final.

RULE 143.—RAPESEED OIL, CRUDE. Shall be pressed and of fair average quality and the free fatty acids shall not exceed 2% nor moisture and impurities exceed ½ of 1%.

RULE 144.—RAPESEED OIL GUARANTEED REFINED OR SHIRASHIME. Shall be pressed, yellow and bright and clear, and free

fatty acids shall not exceed ½ of 1%, and shall be free from moisture, sediment and sulphuric acid. The Halphen test for Cottonseed Oil shall give the negative result. Any oil not meeting the above specifications may be rejected.

RULE 145.—SESAME OIL, BASIS FAIR AVERAGE QUALITY. Contract shall specify whether hot or cold pressed; moisture and impurities shall not exceed ½ of 1%, and free fatty acids not to exceed 3%, but if oil is merchantable, buyer shall not reject, but shall receive an allowance of 1% of the invoice price for each 1% excess, fractions in proportion. Buyer has the right of rejecting delivery if free fatty acids exceed 5%. Must be sweet in flavour and odor.

RULE 146.—CHINESE WHITE VEGETABLE TALLOW. Titre shall not be under 51 degrees centigrade. Should tallow be lower in titre, seller shall make allowance to buyer at the rate of 2/10% of contract price for every 1/10 degree below titre stipulated. Should moisture and impurities exceed 1% buyer shall receive allowance of 1% of contract price fo reach 1% excess, or fractions in proportion. Unless otherwise specified, Chinese White Vegetable Tallow is understood to be packed in matted packages.

RULE 147.—PALM OIL, CRUDE. Shall be guaranteed not to be in excess of 5% free fatty acids at time of shipment as per Eastern Test. If over, an allowance of 1% of the contract price to be paid by sellers to buyers for each per cent over 5% and proportionally for any fraction thereof. Buyers to have the option of refusing delivery if over 7% at time of shipment. *Basis purity.* All moisture and impurities shall be allowed to buyers by sellers. Quality to be equal to "First Quality Sumatra" no bleached to be delivered. Oil to be free from contamination and seawater at time and place of shipment.

RULE 148.—TEASEED OIL. Shall be pure. Free fatty acids shall be as per contract and determined on arrival, unless stated to the contrary in contract. Seller shall make to buyer an allowance for free fatty acids in excess of contract stipulation at the rate of 2% of the invoice price for each 1% free fatty acid or pro-rata for fractions—unless stated to the contrary in the contract.

RULE 149.—IMPORTED REFINED COTTONSEED OILS, sold to arrive as bleachable to 20 yellow 2.5 red, using 6% of Official Fuller's Earth, shall not be rejected if bleaching to 4 red or under, but a penalty of 1/8c per pound shall be imposed, first for failure to bleach, and an additional 5 cents per hundred pounds for each 1/10 red, up to and including 3 red. Between 3.1 red and up to and including 3.5 red an additional 1/8c per pound allowance shall be made. From 3.6 red to 4 red an additional 1/8c per pound allowance shall be made. Oil not bleaching to 4 red may be rejected by the buyer or accepted with an additional allowance either mutually agreed upon or fixed by arbitration.

If negotiations result in ultimate rejection, seller must reimburse buyer immediately.

RULE 150.—TUNG OIL. Guaranteed to pass specification of the Oriental Oils Association.

MEALS

RULE 151.—All meals shall be sold on a basis of net landed weights. Unless otherwise specified by contract the meal shall be packed in bags containing 100 pounds net weight. All bags must be tagged showing the name of the manufacturer or the importer and the guaranteed analysis, showing the minimum amount of protein, the minimum amount of fat, the maximum amount of ash and maximum amount of fiber, and any other analysis required to pass various government and state laws where it may be sold. Unless otherwise specified in the contract, sampling and analysis of meals shall be performed in accordance with the Rules and prescribed methods of the Association of Official Agricultural Chemists in effect at the time of signing the contract.

The tag on sack must state "100 pounds net weight" unless the contract should call for some other sized packing, in which case the tag should read in accordance with the terms of the contract, but the net weight must be shown on the tag on sack.

If contents of bags upon analysis show a protein deficiency, the seller shall reimburse the buyer at the contract price for such deficiencies. If analysis of the meal fails to be equal to or better than the guaranteed analysis, seller to be entirely responsible.

DOMESTIC COTTONSEED OIL AND PEANUT OIL

RULE 152.—As per Rules of the National Cottonseed Products Association Inc.

(Name of Firm)
(Address)

UNIFORM GENERAL CONTRACT
of the
NATIONAL INSTITUTE OF OILSEED PRODUCTS

CLAUSE PARAMOUNT: This contract is subject to published rules of the National Institute of Oilseed Products adopted and now in force, which are hereby made a part hereof, except insofar as such rules may be specifically abrogated herein, and any dispute arising under this contract shall be settled by a Board of Arbitrators selected by the San Francisco Chamber of Commerce and to be judged according to the rules of the National Institute of Oilseed Products, and the findings of said Board will be final and binding upon all the signatories hereto.

BUYER:

SELLER:

COMMODITY:

QUALITY:

QUANTITY:

PACKING:

SHIPMENT:

PRICE:

DUTY:

PAYMENT:

INSPECTION:

WEIGHTS:

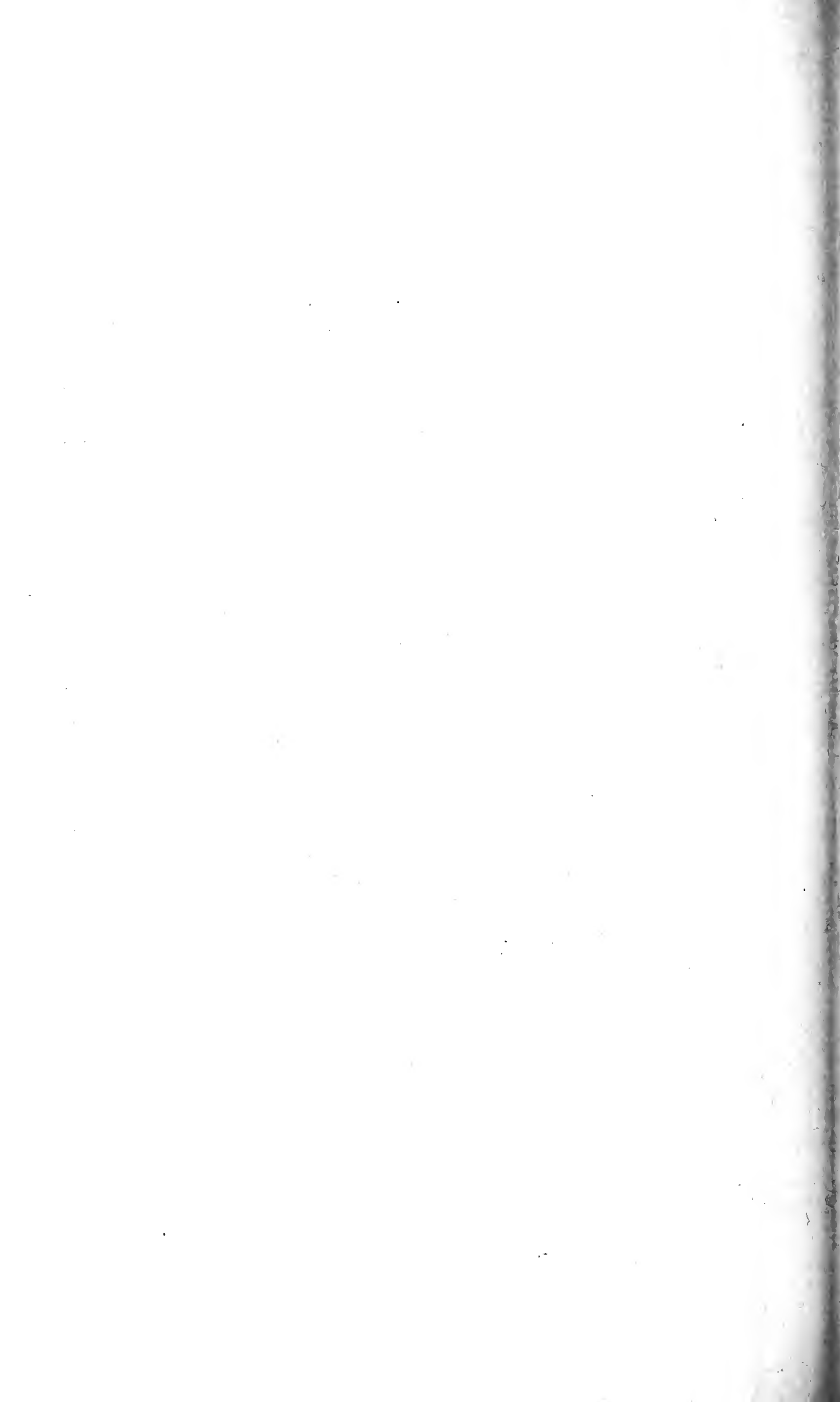
INSURANCE:

SPECIAL CONDITIONS:

____________________	____________________
Buyer	Seller
Buyer's Order No.	Seller's Order No.

____

Broker or Agent



(Name of Firm)
(Address)

UNIFORM CONTRACT
of the
NATIONAL INSTITUTE OF OILSEED PRODUCTS COVERING VEGETABLE OILS IN BULK

CLAUSE PARAMOUNT: This contract is subject to published rules of the National Institute of Oilseed Products adopted and now in force, which are hereby made a part hereof. Any dispute arising under this contract shall be settled by a Board of Arbitrators selected by the San Francisco Chamber of Commerce and to be judged according to the rules of the National Institute of Oilseed Products, and the findings of said Board will be final and binding upon all the signatories hereto.

BUYER:

SELLER:

COMMODITY:

QUALITY: As per Rule 137 to and including 150—which are hereby made an irrevocable part of the contract.

QUANTITY: .... Tons of 2,240 pounds each net landed weights. Seller to have option of shipping 5% more or less on the above quantity. Such surplus or deficiency to be settled at contract price. Any excess or deficiency over 5% to be settled at the price of the day of vessel's arrival. This value to be fixed by a quorum of the Executive Committee of the National Institute of Oilseed Products unless mutually agreed upon. Each shipment to be treated as a separate contract.

SHIPMENT:

PRICE:

DUTY:

PAYMENT:

INSPECTION:

WEIGHTS:

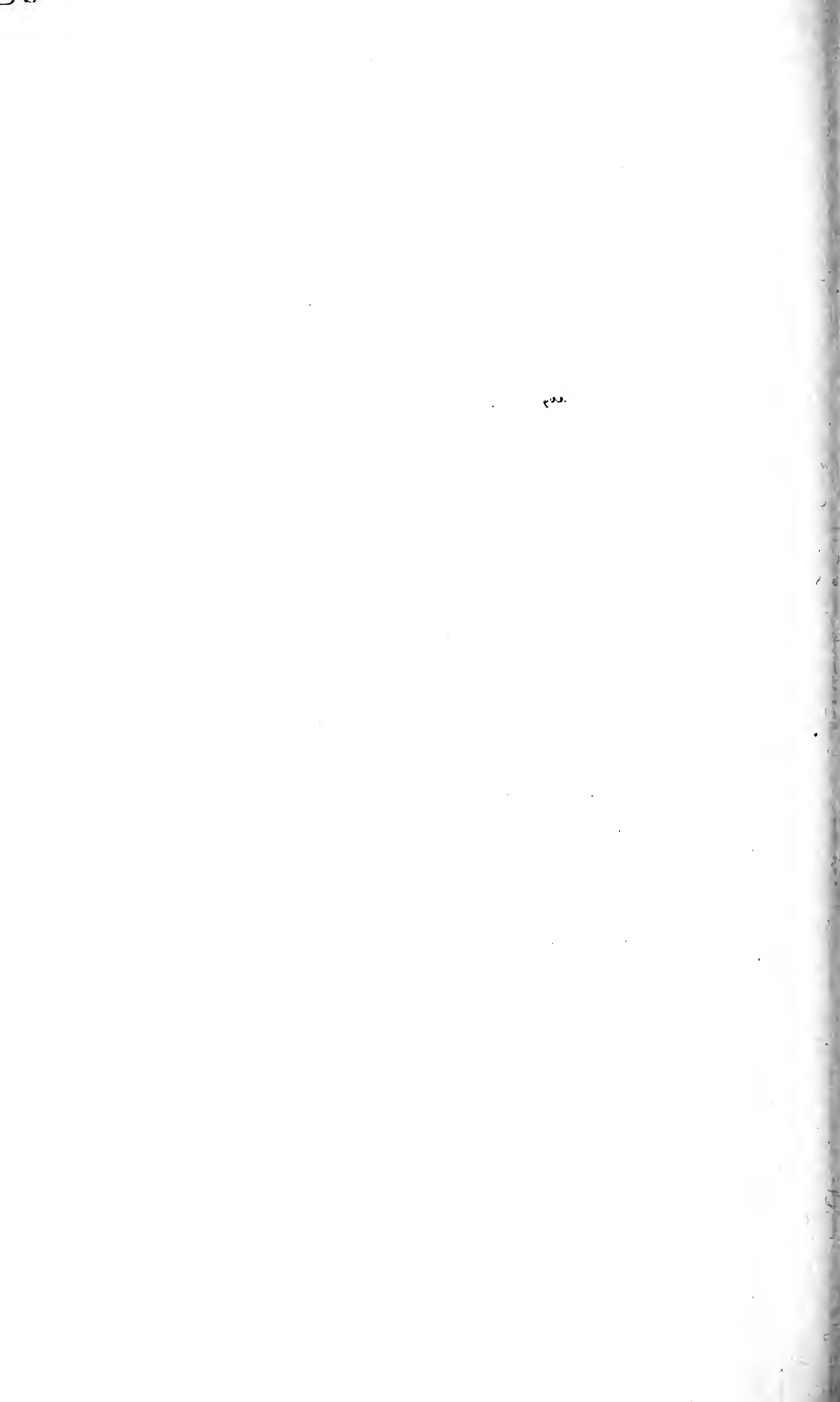
INSURANCE:

____________________ ____________________

Buyer Seller

____

Broker or Agent



[Title of Court and Cause.]

AFFIDAVIT OF LLOYD M. TWEEDT IN OPPOSITION TO NOTICE OF MOTION TO STAY THE ABOVE ENTITLED ACTION PENDING ARBITRATION PROCEEDINGS

State of California,
City and County of San Francisco—ss.

Lloyd M. Tweedt, being first duly sworn, deposes and says:

That he is one of the attorneys for Southern Cotton Oil Company, a corporation, plaintiff in the above entitled action and that he makes this affidavit for and in behalf of said plaintiff; the above entitled action was commenced on the 19th day of November, 1942 and the summons and complaint issued therein were served upon defendant Western Vegetable Oils Company, Incorporated, on the 23rd day of November, 1942; that thereafter said defendant Western Vegetable Oils Company, Incorporated secured from plaintiff herein by stipulation various extensions of time to plead to the complaint herein; that on February 1, 1943, said defendant Western Vegetable Oils Company, Incorporated, served upon plaintiff herein its answer to the complaint herein; that thereafter, to-wit, on the 3rd day of February, 1943, said defendant Western Vegetable Oils Company, Incorporated, served upon plaintiff herein a notice of motion to stay the above entitled action until an arbitration was had between said plaintiff and said defendant;

That the damage to the shipment referred to in the complaint herein occurred during the month of July, 1941; that on [72] the 19th day of January, 1942, plaintiff herein presented claim to defendant Western Vegetable Oils Company, Incorporated, for the damage referred to in the complaint herein; that eventually and prior to the filing of the complaint herein said defendant, Western Vegetable Oils Company, Incorporated, declined any and all liability for said claim.

That said defendant, Western Vegetable Oils Company, Incorporated, never demanded or requested submission of said claim or the controversy between plaintiff and said defendant for liability for said damage to arbitration prior to the filing of the complaint herein as aforesaid; that on the 29th day of January, 1943, said defendant, by and through its attorneys, Manson, Allan & Miller, for the first time served a demand on Messrs. Derby, Sharp, Quinby & Tweedt, attorneys for plaintiff herein, demanding arbitration of the controversy between the said parties. That said defendant Western Vegetable Oils Company, Incorporated, has never, prior to the filing of the complaint herein taken any steps to submit said controversy to arbitration.

Wherefore, plaintiff herein, without admitting that the controversy between said parties is a proper one for submission to arbitration under the terms and provisions of the contract between the said parties, and without admitting that said contract between said parties provides for arbitration, asserts that said defendant Western Vegetable Oils Com-

pany, Incorporated, has waived and abandoned any right it may have heretofore had to submit said controversy to arbitration, and said plaintiff prays that said defendant's notice of motion to stay proceedings be denied.

LLOYD M. TWEEDT [73]

Subscribed and sworn to before me this 13th day of February, 1943.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Affidavit is hereby admitted this .... day of February, 1943.

....

Attorneys for defendant Western Vegetable Oils Company, Inc.

[Endorsed]: Filed Feb. 15, 1943. [74]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN J. WHELAN IN OPPOSITION TO MOTION TO STAY THE ABOVE ENTITLED ACTION PENDING ARBITRATION

State of California,
City and County of San Francisco—ss.

John J. Whelan, being first duly sworn, deposes and says: That he is an attorney-at-law duly admitted to practice before the above entitled Court; that he is employed by Messrs. Derby, Sharp, Quin-

by & Tweedt, attorneys for plaintiff herein, and that he makes this affidavit for and in behalf of plaintiff herein.

That affiant had a number of conversations with Adolph [75] Schumann relative to the matters and claim set forth in the complaint herein; that the last of said conversations took place on or about the 30th day of July, 1942; that at said time, Mr. Schumann expressed a willingness to arbitrate the said dispute between plaintiff and defendant Western Vegetable Oils Company in preference to litigating said dispute, but Mr. Schumann did not at said time, or at any other time at all, in the presence of affiiant, demand or request that said dispute be submitted to arbitration; that Mr. Schumann stated to affiant that he (Mr. Schumann) did not believe that said Western Vegetable Oils Company was liable for the loss and suggested that plaintiff should proceed against the Southern Pacific Company to recover for the loss in question.

That the last written communication received by plaintiff's attorneys from defendant Western Vegetable Oils Company prior to the filing of suit herein was a letter dated June 3, 1942, a copy of which is hereunto annexed and expressly made a part hereof; that no reference to arbitration whatever is made in said letter.

That plaintiff above-named is not now and was not at the time the contract of sale referred to in the complaint herein was made, a member of the National Institute of Oilseed Products.

JOHN J. WHELAN

Subscribed and sworn to before me this 11th day of March, 1943.

[Seal] KATHRYN E. STONE

Notary Public in and for the City and County of San Francisco, State of California. [76]

WESTERN VEGETABLE OILS COMPANY

24 California Street
San Francisco California

June 3, 1942

Derby, Sharp, Quinby & Tweedt
Merchants Exchange Building,
San Francisco, California.

Re: Southern Cotton Oil Company

Gentlemen:

We have your letter of June 2nd and had not acknowledged your letter of May 22nd as we have been waiting for certain information from the east, which we hope to have within a day or two, which has a direct bearing on this matter, and we ask that you be patient for a few days longer and we will advise you our position.

Very truly yours,

WESTERN VEGETABLE OILS CO. INC.

By A. A. SCHUMANN

AAS:FN

(Receipt of Service.)

[Endorsed]: Filed Mar. 11, 1943. [77]

In the Southern Division of the United States District Court for the Northern District of California

No. 22373-S

SOUTHERN COTTON OIL COMPANY, a corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation; WESTERN VEGETABLE OILS COMPANY, INCORPORATED, a corporation; FIRST DOE COMPANY, a corporation; SECOND DOE COMPANY, a corporation; THIRD DOE COMPANY,

Defendants.

MEMORANDUM AND ORDER DENYING MOTION TO STAY TRIAL

Plaintiff sues defendants for damages for failure to deliver a tankcar of coconut oil shipped on July 21, 1941, pursuant to a contract between plaintiff and defendant Western Vegetable Oil Company. The oil was lost in transit. Plaintiff sues both the seller and the shipper, defendant Southern Pacific Company, because each defendant denies liability, and plaintiff does not know whose negligence, if any, caused the loss of the oil.

It is undisputed that plaintiff paid for oil which, through no fault of its own, it never received.

Defendant seller denies liability in its answer [78]

and pleads that the contract incorporated the "Published Rules and Regulations of the National Institute of Oilseed Products", and that rule 64 thereof provides for arbitration of any dispute arising under contracts made subject to the rules of that organization. Defendant moves to stay the action pending the arbitration of the controversy.

Plaintiff contends that the rule of the Institute providing for arbitration is not incorporated in the contract. The contract of sale is drawn on the seller's printed form, and the "Clause Paramount" states: "This contract is subject to the published Rules and Regulations of The National Institute of Oilseed Products and which are hereby made a part of this contract except insofar as such Rules and Regulations are modified or abrogated by this contract." (The name of the Institute is inserted by typewriter.) All the forms of uniform contracts set forth in the "Trade Rules" of this Institute contain a similar clause paramount incorporating the rules and regulations of the Institute, but also add a specific provision with relation to arbitration of disputes arising under the contract as provided for in the rules. The omission of this clause in the contract indicates that the parties intended these rules to apply to performance rather than to enforcement.

Whether or not there was a sufficient incorporation, rule 64 provides that such disputes shall be arbitrated "immediately", and rule 68 sets out "The form of request for arbitration." The loss occurred in July of 1941, claim was made in January of 1942,

and suit was not filed until November 19, 1942. Although the seller suggested that the [79] matter be arbitrated, no formal demand was made by it until after suit was filed. The seller stated in a letter dated June 19, 1942, exhibit "D" attached to an affidavit in support of its motion, that "It is a matter entirely between the Southern Cotton Oil Company and the Railroad, if we are drawn into it well and good."

The solution of the dispute does not involve an interpretation of the contract of sale. Although the contract of sale created the relationship between the seller and plaintiff, just as the contract of carriage created the relationship between the shipper and plaintiff, the action is based on negligence, not on breach of contract. The question to be determined is whether there is negligence of the seller or of the shipper or of both which caused the loss. Assuming for the moment that it was the negligence of the seller, no term of the contract, no provision for the placement of the risk of loss, would be a defense, so that the dispute is not under the contract but outside of it.

Moreover, the nature of the dispute is such that arbitration could not settle it. There is no way in which the shipper, a stranger to the contract of sale, may be forced to arbitrate the matter, and without the shipper before the board of arbitrators, it would be unable to finally determine the controversy.

If arbitration did take place, and should plaintiff obtain an award, the seller would not be prevented from proceeding against the shipper. Should de-

fendant seller receive an award, plaintiff could still proceed against the shipper, which would be entitled to bring the seller into the action; and whatever the effect of the award would be, [80] should the seller be found liable, a complicated question would arise if, after trial on the merits here, judgment went against both defendants as joint tortfeasors.

I am of the opinion that the controversy does not come within the terms of the arbitration clause, and the motion to stay is therefore denied.

It is so Ordered.

Dated: April 2, 1943.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Apr. 2, 1943. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To Southern Cotton Oil Company, a corporation, Plaintiff, and

To Messrs. Derby, Sharp, Quinby & Tweedt, its Attorneys:

To Southern Pacific Company, a corporation, and

To A. A. Jones, Esq., and
A. T. Suter, Esq., its Attorneys:

Notice Is Hereby Given that Western Vegetable

Oils Company, Incorporated, a corporation, defendant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the judgment or order denying the Motion of Defendant Western Vegetable Oils Company, Incorpora*tion* to stay proceedings in the above cause entered in this action on April 2, 1943.

Dated: April 30, 1943.

MANSON, ALLAN & MILLER
Attorneys for appellant Western Vegetable Oils Company, Incorporated, a corporation, 808 Kohl Building, San Francisco, California.

[Endorsed]: Filed Apr. 30, 1943. [82]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents, That we, Western Vegetable Oils Company, Incorporated, a corporation, as principal, and United States Fidelity and Guaranty Company, as surety, acknowledge ourselves to be jointly indebted to Southern Cotton Oil Company, a corporation, and Southern Pacific Company, a corporation, appellees in the above cause in the sum of Two Hundred and Fifty Dollars ($250.00), conditioned that whereas on the 2nd day of April, A. D. 1943 in the District Court of the

United States, for the Northern District of California, Southern Division, in a suit depending in that Court, wherein Southern Cotton Oil Company, a corporation, was plaintiff and Southern Pacific Company, a corporation, and Western Vegetable Oils Company, Incorporated, a corporation, were defendants, numbered on the Civil Docket as 22373-S, an order or judgment was rendered against the said Western Vegetable Oils Company, Incorporated, a corporation, denying the motion of defendant Western Vegetable Oils Company, Incorporated, a corporation, [83] to stay proceedings in said cause, having filed or being about to file in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

Now, the condition of the above obligation is such that if the said appellant Western Vegetable Oils Company, Incorporated, a corporation, shall prosecute its appeal to effect and answer all costs, if the Appeal is dismissed or the judgment affirmed, or if such costs as the Appellate Court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

It being expressly understood and agreed by the undersigned surety, party hereto, that, in case of a breach of any condition hereof, this Court may, upon notice to it, of not less than ten days, proceed summarily in the action in which the foregoing undertaking was given to ascertain the amount which the undersigned surety is bound to pay on account of

such breach, and render judgment therefore against it and award execution therefor.

In Witness Whereof, the undersigned principal and surety have hereunto caused the foregoing cost bond on appeal to be executed by its respective officers thereunto duly authorized this 30th day of April, 1943.

[Seal] WESTERN VEGETABLE OILS COMPANY, INCORPORATED, a corporation

By RALPH J. BOOMER
Its Vice President

By THOS. A. ALLAN
Its Secretary

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY

By ANN MORRISON
Its Attorney in Fact

Approved this .... day of April, 1943.

....
Judge

(Acknowledgment of surety.)

[Endorsed]: Filed Apr. 30, 1943. [84]

[Title of District Court and Cause.]

STAY BOND ON APPEAL

Know All Men by These Presents: That we, Western Vegetable Oils Company, Incorporated, a

corporation, as principal, and United States Fidelity and Guaranty Company, as surety, acknowledge ourselves to be jointly indebted to Southern Cotton Oil Company, a corporation, and Southern Pacific Company, a corporation, appellees, in the above cause in the sum of $250.00, conditioned that

Whereas, on the 2nd day of April A. D. 1943 in the District Court of the United States for the Northern District of California, Southern Division, in an action depending in that Court wherein Southern Cotton Oil Company, a corporation, was plaintiff and Southern Pacific Company, a corporation, and Western Vegetable Oils Company, Incorporated, a corporation, were defendants, numbered on the civil docket as 22373-S a judgment or order was rendered against [85] the said Western Vegetable Oils Company, Incorporated, a corporation, denying the motion of said defendant Western Vegetable Oils Company, Incorporated, a corporation, to stay proceedings in said cause until an arbitration has been had; and

Whereas, said defendant Western Vegetable Oils Company, Incorporated, a corporation, has filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit of Appeals for the Ninth Circuit and a cost bond on said appeal; and

Whereas, the said Western Vegetable Oils Company, Incorporated, a corporation, desires a stay of all proceedings in said cause; and

Whereas, the above entitled Court did on the 12th day of May, 1943 duly make its order herein staying all proceedings in said cause until the final determination of the said appeal from said judgment or order refusing to stay proceedings in said cause, upon the filing of a stay bond in said cause in the sum of $250.00 conditioned to pay all damages suffered by appellees, Southern Cotton Oil Company, a corporation, and Southern Pacific Company, a corporation, by reason of the said stay of proceedings in said cause on said appeal.

Now, Therefore, the condition of the above obligation is such that if the said appellant, Western Vegetable Oils Company, Incorporated, a corporation, shall prosecute its appeal to effect and pay all damages suffered by appellees, Southern Cotton Oil Company, a corporation, and Southern Pacific Company, a corporation, by reason of the said stay of proceedings on said appeal if the appeal is dismissed or the judgment or order appealed from is affirmed, then the above obligation is void, else to remain in full force and effect.

It being expressly understood and agreed by the undersigned surety, party hereto, that, in case of a breach of any [86] condition hereof, this Court may, upon notice *ot* it, of not less than ten days, proceed summarily in the action in which the foregoing undertaking was given to ascertain the amount which the undersigned surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

In Witness Whereof, the undersigned principal and surety have hereunto caused the foregoing stay bond to be executed by its respective officers thereunto duly authorized this 12th day of May, 1943.

WESTERN VEGETABLE OILS COMPANY, INCORPORATED, a corporation

[Seal] By A. SCHUMANN
Its President

By THOS. A. ALLAN
Its Secretary

State of California
City and County of San Francisco—ss.

On this Twelfth day of May in the year One Thousand Nine Hundred and forty-three before me, Edith Goewey a Notary Public, in and for the City and County of San Francisco, State of California, residing therein duly commissioned and sworn, personally appeared A. Schumann and Thos. A. Allan known to me to be the President and Secretary—respectively of the corporation described in and that executed the within instrument, and also known to me to be the person or persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] EDITH GOEWEY

Notary Public in and for the City and County of San Francisco, State of California

My Commission Expires December 23, 1944.

UNITED STATES FIDELITY AND GUARANTY COMPANY

[Seal] By ERNEST W. COPELAND

Its Attorney-in-Fact

State of California,
City and County of San Francisco—ss.

On this 12th day of May in the year one thousand nine hundred and forty three before me George B. Gillin a Notary Public in and for the City and County of San Francisco, personally appeared Ernest W. Copeland known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that (she) he subscribed the name of the United

States Fidelity and Guaranty Company thereto as surety, and his own name as Attorney-in-fact.

[Seal] GEORGE B. GILLIN

Notary Public in and for the City and County of San Francisco, State of California

My Commission Expires December 24, 1946.

Approved this 12th day of May, 1943.

A. F. ST. SURE

Judge

[Endorsed]: Filed May 13, 1943. [87]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Western Vegetable Oils Company, Incorporated, a corporation, one of the defendants in the above-entitled action, in accordance with Rule 75 of the Federal Rules of Civil Procedure, hereby designates the complete record, proceedings and evidence in the above-entitled cause to be contained in the record on appeal from the judgment or order denying said defendant's motion to stay proceedings in the above-entitled cause.

Dated: May 7, 1943.

MANSON, ALLAN & MILLER
Attorneys for defendant Western Vegetable Oils Company, Incorporated, a corporation.
808 Kohl Building
San Francisco, California.

[88]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California
City and County of San Francisco.—ss.

Thos. A. Allan, being first duly sworn, deposes and says:

That he is one of the attorneys for defendant Western Vegetable Oils Company, Incorporated, a corporation, in the above-entitled action; that on the 10th day of May, 1943 he personally deposited in the United States post office at San Francisco, California, full true and correct copies of the foregoing Designation of Record on Appeal in sealed envelopes with first class postage thereon fully prepaid, one thereof directed and addressed to the attorneys for the plaintiff, Messrs. Derby, Sharp, Quinby & Tweedt, [89] 1000 Merchants Exchange Building, San Francisco, California, which was their last known address, and the other thereof di-

rected and addressed to the attorneys for defendant Southern Pacific Company, a corporation, A. A. Jones, Esq. and A. T. Suter, Esq., 65 Market Street, San Francisco, California, which was their last known address.

THOS. A. ALLAN

Subscribed and sworn to before me this 10th day of May, 1943.

[Seal] EDITH GOEWEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 23, 1944.

[Endorsed]: Filed May 11, 1943. [90]

[Title of District Court and Cause.]

STIPULATION AND DESIGNATION AS TO RECORD ON APPEAL

It is hereby stipulated and agreed that the record on appeal from the judgment and order made on April 2, 1943 denying the motion of defendant, Western Vegetable Oils Company, Incorporated, a corporation, to stay the trial shall consist of the following:

1. Complaint.
2. Answer of defendant, Southern Pacific Company, a corporation.
3. Answer of Western Vegetable Oils Company, Incorporated, a corporation.

4. Notice of Motion to Stay Trial Until Arbitration had.
5. Affidavit of Adolph Schumann in support of motion to stay. [91]
6. Affidavit of Lloyd M. Tweedt in opposition to notice of motion to stay.
7. Affidavit of John J. Whelan in opposition to notice of motion to stay.
8. Memorandum and order denying motion to stay.
9. Notice of Appeal.
10. Cost of Bond on Appeal.
11. Stay Bond on Appeal.
12. Designation of Record on Appeal.
13. This Stipulation and Designation of Record on Appeal.

which are hereby designated as the record to be contained in the record on said appeal in accordance with Rule 75 of the Federal Rules of Procedure.

Dated: May 11, 1943.

MANSON, ALLAN & MILLER
Attorneys for Defendant and Appellant, Western Vegetable Oils Company, Incorporated, a corporation.

DERBY, SHARP, QUINBY & TWEEDT
Attorneys for Plaintiff and Appellee, Southern Cotton Oil Company, a corporation.

A. A. JONES
A. T. SUTER
Attorneys for Defendant and Appellee, Southern Pacific Company, a corporation.

[Endorsed]: Filed May 18, 1943. [92]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 92 pages, numbered from 1 to 92, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Southern Cotton Oil Company, a corp., Plaintiff, vs. Southern Pacific Company, a corp., et al., Defendant. No. 22373-S., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeals is the sum of Five-dollars and seventy-five-cents ($5.75) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 7th day of June A. D. 1943.

[Seal] WALTER B. MALING
Clerk
WM. J. CROSBY
Deputy Clerk [93]

[Endorsed]: No. 10455. United States Circuit Court of Appeals for the Ninth Circuit. Western Vegetable Oils Company, Incorporated, a Corporation, Appellant vs. Southern Cotton Oil Company, a Corporation, Southern Pacific Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: June 8, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10455

SOUTHERN COTTON OIL COMPANY,
a corporation,

Appellee,

vs.

SOUTHERN PACIFIC COMPANY
a corporation,

Appellee,

WESTERN VEGETABLE OILS COMPANY,
INCORPORATED, a corporation,

Appellant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

Western Vegetable Oils Company, Incorporated, appellant, files the following statement of the points on which it intends to rely on its appeal from the order entered by the District Court herein on the 2nd day of April, 1943 denying Western Vegetable Oils Company, Incorporated's motion to stay proceedings in said District Court in the above-entitled action until arbitration has been had.

Appellant states:

I.

The controversy between the parties to the above-

entitled action which is the subject matter of said action arises under a written contract between Southern Cotton Oil Company, plaintiff herein, and Western Vegetable Oils Company, Incorporated, one of the defendants herein, evidencing a transaction involving commerce containing a written provision to settle by arbitration controversies thereafter arising out of the contract or the refusal to perform the whole or any part thereof.

II.

The written provisions in said contract providing for arbitration is valid, enforceable and irrevocable and was at the time of the commencement of the above-entitled action, and now is, in full force and effect.

III.

The Controversy which is the subject matter of the above-entitled action is a controversy which is referable to arbitration under the terms of said contract and is required by the terms of said contract to be submitted to arbitration in the manner provided in said contract.

IV.

The above-entitled action brought by Southern Cotton Oil Company, plaintiff herein, and the trial of said action, must be stayed by the District Court in which such action is brought until such arbitration has been had, upon the application of Western Vegetable Oils Company, Incorporated for a stay of such proceedings in said action until such arbitration may be had.

V.

Western Vegetable Oils Company, Incorporated has not waived its right to such arbitration of said controversy under said contract, having pleaded the existence of said contract providing for such arbitration in its answer to the complaint of plaintiff, Southern Cotton Oil Company, on file herein and having made its motion for a stay of said action until such arbitration may be had.

VI

The District Court has the power and the duty to stay said action and the trial thereof upon the application of Western Vegetable Oils Company, Incorporated for such a stay, and the existence of a party to said action who is not a party to said contract does not deprive the District Court of the power nor relieve the District Court of the duty to grant said stay of said action.

Appellant Western Vegetable Oils Company, Incorporated hereby designates the complete record filed in said cause in the above-entitled Court as the record for printing herein.

Dated: June 16th, 1943.

MANSON, ALLAN & MILLER
Attorneys for Appellant
Western Vegetable Oils
Company, Incorporated, a
corporation.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF MAILING

State of California
City and County of San Francisco—ss.

Thos. A. Allan, being first duly sworn, deposes and says:

That he is one of the attorneys for appellant Western Vegetable Oils Company, Incorporated, a corporation, in the above-entitled action: that on the 16th day of June, 1943 he personally deposited in the United States post office at San Francisco, California, a full true and correct copy of the foregoing Statement of Points on which appellant intends to rely on appeal and Designation of Parts of the Record to be printed in sealed envelopes with first class postage thereon fully prepaid, one thereof directed and addressed to the attorneys for Appellee Southern Cotton Oil Company, Messrs. Derby, Sharp, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco, California, which was their last known address, and the other thereof directed and addressed to the attorneys for Appellee Southern Pacific Company, a corporation, A. A. Jones, Esq. and A. T. Suter., Esq., 65 Market Street, San Francisco, California, which was their last known address.

THOS. A. ALLAN

Subscribed and sworn to before me this 16th day of June, 1943.

[Seal] EDITH GOEWEY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 23, 1944.

[Endorsed]: Filed Jun. 17, 1943.

No. 10,455

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation),
Appellant,

vs.

SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation),
Appellees.

BRIEF FOR APPELLANT.

MANSON, ALLAN & MILLER,
Kohl Building, San Francisco,
Attorneys for Appellant.

FILED
JUL 29 1943
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,455

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation), *Appellant,* vs. SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation), *Appellees.*	}

BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

Western Vegetable Oils Company, Incorporated, defendant below, appeals from an order of the United States District Court for the Northern District of California, Southern Division, denying the motion of appellant to stay proceedings in the District Court pending arbitration. (Tr. p. 29.)

The action was brought in the District Court by Southern Cotton Oil Company, a corporation organized and existing under the laws of New Jersey, as plaintiff, against Southern Pacific Company, a corpo-

ration organized and existing under and by virtue of the laws of Kentucky, and Western Vegetable Oils Company, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of California, as defendants.

The complaint (Tr. p. 2) sets forth a cause of action for damages resulting from the loss in transit of a tank car of coconut oil purchased by plaintiff, Southern Cotton Oil Company, from defendant, Western Vegetable Oils Company, Incorporated and transported by defendant, Southern Pacific Company. The damages sought are $3847.50, exclusive of interest and costs.

The answer of defendant, Western Vegetable Oils Company, Incorporated (Tr. p. 15) pleads as a defense to the action a contract under which the tank car of coconut oil was purchased, alleging that by the terms of said contract the dispute, which is the subject of the action so commenced by Southern Cotton Oil Company, must be submitted to arbitration.

Subsequently, and before the action was set for trial, Western Vegetable Oils Company, Incorporated filed its motion to stay proceedings in the action until arbitration under the terms of the contract could be had. (Tr. p. 23.)

(a) The District Court has jurisdiction of the parties and the subject matter of the action by virtue of Section 41, 28 U.S.C.A.

(b) This Court has jurisdiction upon appeal to review the said order of the District Court denying

the motion of Western Vegetable Oils Company, Incorporated, to stay the action under and by virtue of Section 227, 28 U.S.C.A.

(c) The pleadings which show the existence of the jurisdiction are the complaint (Tr. p. 3), the answer of defendant, Western Vegetable Oils Company, Incorporated (Tr. p. 15), and the motion of defendant, Western Vegetable Oils Company, Incorporated, to stay proceedings. (Tr. p. 23.)

II.

STATEMENT OF THE CASE.

On the 18th of June, 1941, Western Vegetable Oils Company, Incorporated, and Southern Cotton Oil Company entered into a contract (Tr. p. 20) under which Western Vegetable Oils Company, Incorporated agreed to sell to Southern Cotton Oil Company five tank cars, approximately 60,000 pounds each, of crude coconut oil. The contract specified that shipment was to be made in July, 1941 in "Seller's Tankcars" and the price was specified to be "Five and Seven Eighths Cent (5⅞¢) per pound, F.O.B. Seller's Plant, Outer Harbor, Oakland, California".

This contract also contained as its final paragraph a clause reading as follows:

> "(6) This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof,
>
> Clause Paramount: This contract is subject to the published Rules and Regulations of the Na-

tional Institute of Oilseed Products—and which are hereby made a part of this contract, except insofar as such Rules and Regulations are modified or abrogated by this contract." (Tr. p. 22.)

The published rules and regulations of the National Institute of Oilseed Products (Tr. p. 37), referred to in paragraph (6) of the contract quoted above contained, among other rules, the following:

> "Rule 64.—Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products." (Tr. p. 54.)

On July 18, 1941 one tank car of coconut oil was shipped by appellant Western Vegetable Oils Company, Incorporated from Oakland, California under this contract. Shipment was made by delivery of this tank car to defendant and appellee Southern Pacific Company, as alleged in paragraph VII of the complaint of Southern Cotton Oil Company. (Tr. p. 4.) Plaintiff and appellee Southern Cotton Oil Company alleges in its complaint that the shipment of coconut oil was lost in transit, which defendant and appellee Southern Pacific Company admits in its answer.

Subsequent to the loss of the contents of this tank car of coconut oil correspondence ensued between appellant and Southern Cotton Oil Company with respect to responsibility for the loss. This correspondence is set forth in exhibits to the affidavit of Adolph

Schumann in support of appellant's motion to stay proceedings in this action. (Tr. p. 26.) As shown by Exhibit "A" to this affidavit (Tr. pp. 29-30), appellant proposed arbitration of the dispute. As shown by Exhibit "A" to Mr. Schumann's affidavit (Tr. pp. 32-33), appellee Southern Cotton Oil Company responded to this propsal as follows:

> "Mr. Schumann refers to arbitration, and it seems to me that if there is any arbitration, it should be between the Western Vegetable Oils Company and the railroad, because we should not be made to stand any part of the loss."

Subsequently and on November 19, 1942 the complaint was filed in the District Court.

On January 12, 1943 defendant and appellant Western Vegetable Oils Company, Incorporated filed its answer in the action in the District Court setting forth the contract between appellant and appellee Southern Cotton Oil Company dated the 18th day of June, 1941 (Tr. p. 20), setting forth rule 64 of the published rules and regulations of the National Institute of Oilseed Products and asking for a stay of proceedings until arbitration under these rules could be had.

On February 3, 1943 appellant Western Vegetable Oils Company, Incorporated filed its motion to stay the action in the District Court until such arbitration could be had. (Tr. p. 23.) After hearing, the District Court filed on April 2, 1943 its memorandum and order denying motion to stay trial. (Tr. p. 90.)

III.

SPECIFICATIONS OF ERROR.

(1) The District Court erred in holding that the controversy which is the subject matter of this action does not come within the arbitration clause of the contract between plaintiff and appellee, Southern Cotton Oil Company, and defendant and appellant, Western Vegetable Oils Company, Incorporated.

(2) The District Court erred in denying the motion of defendant and appellant Western Vegetable Oils Company, Incorporated to stay proceedings in the action before the District Court until arbitration of the controversy could be had.

IV.

STATEMENT OF THE ARGUMENT.

The controversy which is the subject matter of the action in the District Court arises under a written contract, containing a provision to settle by arbitration a controversy thereafter arising out of the contract. As set forth in the statement of the case the contract (Tr. p. 22) contains the following provision:

> "Clause Paramount: This contract is subject to the published Rules and Regulations of the National Institute of Oilseed Products—*and which are hereby made a part of this contract,* except insofar as such Rules and Regulations are modified or abrogated by this contract." (Emphasis supplied.)

It thus appears that by the terms of the clause paramount the rules and regulations of the National Institute of Oilseed Products were incorporated by reference in the contract between the parties. It is well established that such a reference in a contract to another document renders the other document a part of the contract. As also set forth in the statement of facts, the published rules and regulations of the National Institute of Oilseed Products contain the following rule:

> "Rule 64.—Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products."

This rule is therefore made a provision of the contract requiring controversies arising under the contract to be settled by arbitration. A similar situation, involving the incorporation of a provision for arbitration in a contract by reference in the contract to another document is presented by *Hines v. Ziegfeld,* 226 N. Y. Supp. 562 (1928). In this case an agreement to employ an actress provided that all of the terms and conditions of the actor's equity form of contract should be deemed to be a part of the agreement. The actor's equity form of contract contained a clause providing for the arbitration of any dispute arising under the contract. The court held that the terms of the actor's equity form of contract, includ-

ing the provision requiring arbitration of disputes arising under the contract, were a part of the agreement between the parties and had been incorporated by reference in it. The court said, in 226 N. Y. Supp. at p. 566:

> "Here it is expressly provided that certain provisions for arbitration shall be made a part of the contract between the parties. The arbitration clause therefore is applicable, and it follows that all questions for decision must be decided by arbitration."

In reaching its decision in *Hines v. Ziegfeld,* supra, the court specifically distinguished cases in which an arbitration clause contained in a separate document, but not stated to be made a part of the agreement out of which the dispute arose, had been held not to be a part of the agreement. There can be no question, in view of the language used in the "Clause Paramount" that the parties intended that the rules of the National Institute of Oilseed Products, and all of them, were specifically to be considered a part of their contract of sale.

In *Marine Transit Corporation v. Dreyfus,* 284 U.S. 263, 52 S. Ct. 156, 76 L. Ed. 282, the parties had entered into a contract called a "booking agreement" under which Marine Transit Corporation agreed to furnish to Louis Dreyfus & Company canal tonnage for the transportation of wheat. The contract between the parties provided that it should be "subject to the New York Produce Exchange Canal Grain Charter Party No. 1 as amended." The charter party

contained a provision requiring arbitration of all disputes arising under it. The charter party was a separate document referred to in the contract between the parties. The contract does not appear to have stated specifically that the charter party was deemed to be a part of the contract. A shipment of wheat carried in a barge furnished under the contract was lost and Louis Dreyfus & Co. filed a libel in admiralty to recover damages for loss of the wheat and later moved for a reference of the dispute to arbitration. The court held that the dispute was referable to arbitration under the contract and, in doing so, necessarily held that the provision for arbitration contained in the charter party was a part of the contract to furnish tonnage. The court said in 76 L. Ed. at p. 286:

> "There is no question that the controversy between the petitioner and the respondents was within the arbitration clause of the booking contract."

It is noteworthy that in several cases arising in California the provisions of a separate document, not stated in the agreement as having been made a part of the agreement, have been held to have become a part of the agreement by much less explicit reference. In *Asnon v. Foley,* 105 Cal. App. 624 (1930), the contract provided that:

> "Labor and materials furnished to be governed by Pacific Coast Sales Book plus ten per cent."

The Pacific Coast Sales Book was used by contractors and showed prices of construction materials as

they varied from time to time. The court held that the prices so specified were the prices applicable to the contract between the parties.

In *Bell v. Rio Grande Oil Company,* 23 Cal. App. (2d) 436 (1937), an agreement to make a lease embodied in a letter written and signed by the parties stated:

> "Your lease to us is to be Oil Age Form 86, with modification to conform with this letter."

The Oil Age Form 86 contained, as one of its standard provisions, a surrender clause, permitting the lessee to quitclaim the leasehold to the lessor upon payment of a certain sum as liquidated damages, upon which all rights and obligations of the parties would terminate. Subsequently the lessee surrendered the lease and the lessor attempted to treat the surrender as a breach of the original agreement to lease the property.

The court held that the surrender clause contained in Oil Age Form 86 was a part of the agreement between the parties, saying in 23 Cal. App. (2d) at p. 440:

> "A written agreement may, by reference expressly made thereto, incorporate other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one."

Again in *Beedy v. San Mateo Hotel Company,* 27 Cal. App. 653 (1915), an agreement to subscribe to

shares of stock referred to "the annexed 'List of subscribers to capital stock in the San Mateo Hotel project'". The court held that the subscription agreement and the list of subscribers constituted one document even though the list of subscribers appeared not to have been actually "annexed" to the subscription agreement, and further held that actual annexation was not essential to a merger by reference of the separately executed documents.

It thus appears that the rules of the National Institute of Oilseed Products would have become a part of the agreement between appellant and appellee, Southern Cotton Oil Company, even without the specific statement in the agreement that the rules "are hereby made a part of this contract". However, the use of this language places the matter beyond question.

In these circumstances the agreement to submit to arbitration controversies arising under the contract is valid, irrevocable and enforceable within the meaning and intent of the laws of the United States and of the State of California. The provisions of the United States Arbitration Act, Title 9, Sections 1 to 15, U.S.C.A. and of the Code of Civil Procedure of the State of California, Title X, Sections 1280 to 1293 are closely similar.

The United States Arbitration Act, Title 9, Section 2, U.S.C.A., provides as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction in-

> volving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 1280 of the Code of Civil Procedure of the State of California provides as follows:

> "Validity of arbitration agreements. A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 1281 of this code, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, the provisions of this title shall not apply to contracts pertaining to labor."

Both of the foregoing statutory provisions are applicable to this case. The contract between appellant and appellee, Southern Cotton Oil Company, provides in its final paragraph, as stated in the statement of facts, a clause reading as follows:

> "(6) This contract shall be deemed to be made and performed in California and is to be governed by the laws thereof."

It is thus the expressed intention of the parties that the laws of California should govern their rights and obligations under the contract.

Furthermore, since the contract between these parties plainly evidences "a transaction involving commerce", in that it involves sales made in interstate commerce and since the plaintiff and appellee, Southern Cotton Oil Company, chose to bring an action upon the contract in a court of the United States, the provisions of the United States Arbitration Act are equally applicable.

The validity of both statutes, Federal and State, is no longer open to any question. In *Marine Transit Corporation v. Dreyfus*, supra, the Supreme Court of the United States considered the United States Arbitration Act, held it constitutional, and sustained the action of the District Court in issuing its order compelling the parties to arbitrate the controversy involved in this action. This controversy involved the right of Louis Dreyfus & Company to recover damages for the loss of a cargo of wheat carried in a barge provided by Marine Transit Corporation pursuant to the contract.

More recently in *Kulukundis Shipping Co. v. Amtorg Trading Corporation,* 126 Fed. (2d) 978, the court considered the United States Arbitration Act and its history at length, holding that an agreement to arbitrate disputes contained in a charter party was binding upon the parties and required submission to arbitration of a claim for damages for breach of contract.

In *Parry v. Bache,* 125 Fed. (2d) 493, the court held that a dispute arising under a written contract providing for the arbitration of such disputes was enforceable and that a stay of proceedings should be granted by the federal court in which action upon the contract was brought even though under the law of Florida, where the contract was made, the agreement of arbitration may not have been enforceable.

The validity of the California statutes above cited has been upheld in several cases. In *Snyder v. The Superior Court,* 24 Cal. App. (2d) 263, the constitutionality of Title X of the Code of Civil Procedure of the State of California was specifically upheld by the Supreme Court of the State of California. The same result was reached in *Pacific Indemnity Co. v. Insurance Co. of North America,* 25 Fed. (2d) 930, in which the arbitration statutes of the State of California were in issue and in which the claim of unconstitutionality had been made.

It is equally certain that the controversy which is the subject matter of the action in the District Court is a controversy which is referable to arbitration under the terms of the contract and is required by the terms of the contract to be submitted to arbitration. The complaint of plaintiff and appellee, Southern Cotton Oil Company, alleges in paragraph IX (Tr. p. 5) that the defendant and appellant, Western Vegetable Oils Company, Incorporated and the defendant and appellee, Southern Pacific Company failed and neglected to deliver the shipment of coconut oil to

the plaintiff and appellee at Gretna, Louisiana. In paragraph XI of the complaint (Tr. p. 6) the plaintiff and appellee alleges various acts of negligence on the part of both defendants in providing a proper tank car in which to make shipment and in properly loading and inspecting the car. In paragraph XII of the complaint (Tr. p. 6) the plaintiff alleges that it has been damaged "by reason of the premises".

The District Court appears in its opinion (Tr. p. 92) to have construed the complaint as setting forth only a claim for damages for negligent conduct causing the loss of the shipment saying (Tr. p. 92): "The question to be determined is whether there is negligence of the seller or of the shipper or of both which caused the loss." The District Court then concludes that the dispute is outside of, rather than within, the contract.

The District Court overlooks the fact that the allegations of paragraph IX of the complaint would support a judgment for damages for breach of contract, irrespective of negligence. However, disregarding for the purposes of discussion the allegations of paragraph IX of the complaint, the District Court fails to recognize that all of the allegations of negligence on the part of the appellant contained in paragraph XI of the complaint constitute allegations of negligence in the performance of duties required by the contract to be performed. These allegations are of course denied by the appellant in paragraph III of its answer. (Tr. p. 17.)

It must be observed that the contract specifies "Packing: Seller's Tankcars" and by its terms contemplated shipment from "Seller's Plant, Outer Harbor, Oakland, California." (Tr. p. 21.)

There is thus imposed upon appellant as seller, by the contract itself, the duty to furnish a suitable tank car in proper condition, and to load and inspect the car in such a manner as to guard against loss of the contents. These duties are created by the contract, which created the relationship between the seller and the buyer of the oil out of which this entire controversy grows. Thus, in settling this controversy and in determining questions of negligence, it is necessary to decide how far the seller performed, or failed to perform, the duties imposed upon it by the contract. This is clearly a controversy arising under the terms of the contract, since it is the contract itself which gives rise to the duties of the seller. It is elementary that there is no responsibility for negligent conduct unless there is a corresponding duty arising from some source to exercise due care. The source from which any duties of appellant to appellee Southern Cotton Oil Company arise is the contract between them.

An arbitration agreement of this type is broad enough to cover any such controversy as is here involved. General arbitration agreements have been held to cover a wide variety of disputes beeween the parties to the agreement. In *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.*, 70 Fed. (2d) 297, the dispute arose under a contract for the sale of a quantity of coal over a period of years. The plaintiff

claimed as damages the commissions upon the quantity of coal which the defendant refused to purchase from the plaintiff. The court said in 70 Fed. (2d) at p. 299:

> "* * * a clause of general arbitration does not cease to be within the statute when the dispute narrows down to damages alone. General Footwear Co. v. A. C. Lawrence Leather Co., 252 N. Y. 577, 170 N. E. 149; Merchant v. Mead-Morrison Co., 252 N. Y. 284, 298, 299, 169 N. E. 386. If the clause is general in form, it makes no difference what may come up under it."

In *In re Utility Oil Corporation,* 69 Fed. (2d) 524, a charter party contained a general arbitration clause stating that:

> "Any dispute arising during performance of this Charter Party shall be settled by arbitration in New York, * * *"

A claim was made for damages for breach of the charter, arising from the refusal of the charterer to deliver any further cargoes to the vessel. The court said in 69 Fed. (2d) at p. 526:

> "A dispute arose under the contract, for here one of the parties, in the opinion of the other, failed to perform. Arbitration clauses are designed to provide remedies for such situations. * * * But it is argued that the appellant terminated performance and therefore the arbitration clause does not apply. The parties clearly intended to arbitrate 'any dispute arising during the performance of this Charter Party'. Their intention so to do should be strictly observed."

In *Kulukundis Shipping Co. v. Amtorg Trading Corporation,* supra, the dispute to be arbitrated again involved damages for breach of contract arising through failure of one of the parties to perform a charter party. The court said in 126 Fed. at p. 988:

> "The arbitration clause here was clearly broad enough to cover the issue of damages; * * *"

The court further cited with approval the language quoted above from *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.,* supra.

It is to be noted also that the same broad construction has been placed upon general arbitration clauses by the courts of the State of New York, which enacted one of the first general arbitration statutes. In *Berkovitz v. Arbib,* 183 New York Supp. 305 (1920), a contract for the purchase of skins contained the following clause:

> "Skins to be the usual quality of their kind, and claims in regard thereto shall not invalidate this contract, but shall be settled amicably or by arbitration in New York in the usual manner."

The purchaser refused to pay for the skins on the ground that quantities and weights were not in accordance with the contract, and resisted arbitration on the ground that by virtue of the clause above quoted arbitration was to apply only to questions of "quality". The Court held that the contract provided for arbitration no matter what the ground for failure to perform the contract may have been.

In *General Footwear Corporation v. Lawrence Leather Company,* 252 New York 577, 170 N. E. 149, the parties had entered into a contract by which the defendant was to sell to the plaintiff a quantity of lamb skins. The contract contained a clause as follows:

> "Arbitration. Any dispute arising under this contract shall be submitted to an arbitrator to be agreed upon by the parties."

Plaintiff brought an action to compel the parties to proceed to arbitration, claiming damages for breach of contract arising from the defendant's failure to deliver the skins. The defendant asserted that such a breach was not a matter for arbitration under the contract. The court held that the language of the arbitration provision was broad enough to cover any dispute arising under the contract and compelled arbitration.

In *Freydberg Bros. v. Corey,* 31 New York Supp. (2d Series) 10 (1941), the provision for arbitration read as follows:

> "Any dispute of any nature that might arise between us is to be adjusted by the American Arbitration Association."

The dispute between the parties was as to whether the arbitrator himself could determine whether or not he possessed jurisdiction of a given dispute. The court said, at page 11:

> "This language would seem to authorize the arbitrator to pass upon any dispute whatsoever arising out of the employment relationship between the parties."

Since, as pointed out above, even the most narrow construction of the complaint in this action involves the question as to whether the appellant properly performed duties imposed upon it by the contract, there can be no doubt that the arbitration clause is broad enough to cover the dispute.

In the circumstances of this case the power, and indeed the duty, of the District Court to stay the action before it until arbitration can be had is not to be doubted. Section 3 of the United States Arbitration Act reads as follows:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Section 1284 of the Code of Civil Procedure reads as follows:

> "Stay of civil action. If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the

agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Defendant and appellant, Western Vegetable Oils Company, Incorporated, set forth in its answer (Tr. p. 15) the existence of the contract between it and plaintiff and appellee, Southern Cotton Oil Company, and the provisions of the contract requiring arbitration. In its prayer for relief (Tr. p. 19) appellant requested that the action be stayed until the required arbitration could be had. Subsequently, and before the action could be set for trial, appellant filed its notice of motion to stay the action upon the same grounds. (Tr. p. 23.) It must further be observed that appellant filed in the action the affidavit of Adolph Schumann (Tr. p. 26), the president of appellant, Western Vegetable Oils Company, Incorporated, to which affidavit were attached various exhibits referred to in the statement of the case showing that he as president of appellant proposed arbitration long before this action was commenced.

In these circumstances it is submitted that the case of *Shanferoke Coal & Supply Corp. v. Westchester Corp.*, supra, later affirmed by the Supreme Court of the United States in 293 U. S. 449, 79 Law. Ed. 583, is decisive, not only of the question of the power of the District Court to grant the stay of proceedings, but also upon the question of any alleged default of appellant in seeking arbitration. In this case the contract between the plaintiff and defendant involved the sale of coal upon commission. The de-

fendant repudiated the contract after two-thirds of the quantity of coal remained to be delivered and the plaintiff brought suit for commissions which would have been earned. The contract contained a provision requiring that "In case any dispute should arise between the Buyer and the Seller as to the Performance of any of the terms of this agreement" such dispute should be submitted to arbitration, and further providing that if the arbitration should fail to proceed to a final award, "either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York".

It further appears that the defendant, upon suit being filed, filed its answer setting up the contract requiring arbitration as a defense, and seeking a stay of proceedings.

On these facts, strikingly similar to the instant case, both the Circuit Court of Appeals and the Supreme Court held that the District Court in which the action was brought had power to stay the action under the provisions of the United States Arbitration Act. It is particularly significant that both courts stated that this power existed even though, by virtue of the reference in the contract to the laws of New York the District Court might not have had power specifically to compel arbitration of the controversy, i.e., that even though this latter power was by contract conferred only upon a state court, the power to stay the action existed in the federal court.

In this case also there is the striking similarity with the instant case that defendant was alleged to be in default in proceeding with the arbitration because it raised the question of arbitration for the first time in its answer. Both courts squarely held that, having raised the defense in the answer, the defendant was not in default. In the instant case, an inspection of the affidavit of the president of appellant will show that appellant requested arbitration long prior to the commencement of any action, so that there is even less merit for the contention that appellant is in default. In this connection it is worth mentioning that we have been able to find no case in which a party desiring arbitration is held to have been in default when he raises the question of arbitration in his answer to a suit upon the agreement. Of course, where the defendant does not raise his defense in his answer, but pleads to the merits of the action and seeks affirmative relief without regard to the arbitration clause of his contract the defendant has been held, as in *Radiator Speciality Co. v. Cannon Mills,* 27 Fed. (2d) 318, to have waived the defense.

The facts in the instant case are altogether different. As to both the questions of the power of the District Court to grant the stay sought and as to the defendant being in default in seeking arbitration it would be possible to quote virtually the whole of the opinions in the *Shanferoke* case, but it is deemed unnecessary to do so. On the question of default, however, one quotation may well be emphasized. The court says in 70 Fed. (2d) at page 299:

"The plaintiff further objects that the defendant is 'in default in proceeding with such arbitration,' within the meaning of section 3. True, it has not named its arbitrator, but in its answer and moving affidavits has merely expressed its willingness to submit to arbitration. This appears to us enough. It was the plaintiff who declared the contract to be at an end; and with that the defendant was contented. If the plaintiff meant to proceed further and enforce a claim for damages, the initiative rested upon it; it should have named the first arbitrator. If it did not but sued instead, it was itself the party who fell 'in default in proceeding with such arbitration,' not the defendant."

A very similar result was reached in *Kulukundis Shipping Co. v. Amtorg Trading Corporation,* supra. There the appellant originally filed an answer to the complaint without referring to the arbitration provisions of the contract. Nine months later, and two months before the trial, the appellant sought to amend its answer to allege the arbitration agreement as a defense to the action. The Circuit Court of Appeals held that the amendment should have been allowed and that the District Court should have stayed the action pending arbitration. This case again illustrates both the power and the duty which rests upon the District Court to stay proceedings in the action when such a stay is requested. It also shows most strongly that so long as the defense of the agreement to arbitrate is raised by answer the defendant cannot be held to be in default in proceeding with the arbitration.

In the case at bar there can be no question that the defendant and appellant is not in such default.

Parry v. Bache, supra, presents an example of the granting of the stay of proceedings in a federal court where no right to such a stay would have existed under state law. There the suit was originally brought in the state court of Florida and removed to the federal court. It was claimed that the Florida law did not recognize the enforceability of the arbitration agreement. The court held that the United States Arbitration Act controlled the procedure in the federal court and that the view that the state court might have taken of the agreement was immaterial.

In the instant case the law of the State of California, upon which the parties in their contract agreed to be bound, and the federal law as well, require the granting of the stay of proceedings in the circumstances here presented.

The District Court appears to have thought that the stay of proceedings should not be granted because of the presence of Southern Pacific Company as a defendant in the action. Neither the United States Arbitration Act nor the statutes of the State of California above cited authorize the court to refuse to grant the stay of proceedings on any such ground. The stay of proceedings is authorized by the statutes because the parties to the dispute have bound themselves by their contract to arbitrate the dispute. The fact that someone not a party to the contract is involved in the dispute to be arbitrated can have no bearing upon the validity of the agreement to arbitrate and

cannot prejudice the right to arbitration to which the party seeking it is entitled. So long as the conditions of section 3 of the United States Arbitration Act and section 1284 of the Code of Civil Procedure of the State of California are met it is the duty of the court to grant the stay. It is not one of the conditions of these statutes that no other parties should be involved in the litigation. It is obvious that a very large proportion of disputes arising under a contract providing for arbitration could involve in one way or another persons who were not parties to the arbitration agreement, and to refuse to grant the stay in all such circumstances would deprive the statutes authorizing the stay of the greater part of their meaning.

When the issue between the parties to the arbitration agreement has been determined by arbitration such further proceedings may be taken in the action as may be necessary to determine the rights and duties of the parties to the action who were not parties to the agreement of arbitration. In fact, *Marine Transit Corporation v. Dreyfus*, supra, shows that it is proper to refer to arbitration under such an agreement the portion of the dispute between the parties which is subject to the arbitration agreement. There the claim *in personam* against Marine Transit Corporation and not the claim *in rem* against one of the vessels involved in the loss of the cargo was referred to arbitration although both claims were involved in the original action.

It should be noted that the appealability of the order of the District Court denying the appellant's motion

to stay proceedings is established by *Shanferoke Coal and Supply Corp. v. Westchester Service Corp.,* supra, in which the Supreme Court holds that the motion for stay of proceedings is in the nature of an application for an interlocutory injunction, that the District Court's order upon the motion is an interlocutory order, and is therefore appealable to the Circuit Court of Appeals under section 129 of the Judicial Code, Title 28, section 227, U.S.C.A.

It is respectfully submitted that for the reasons set forth herein the order of the District Court should be reversed with directions to the District Court to grant a stay of proceedings in this action until arbitration can be had.

Dated, San Francisco,
July 28, 1943.

MANSON, ALLAN & MILLER,
Attorneys for Appellant.

No. 10,455

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation), *Appellant,* vs. SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation), *Appellees.*	}

BRIEF FOR APPELLEE, SOUTHERN COTTON OIL COMPANY.

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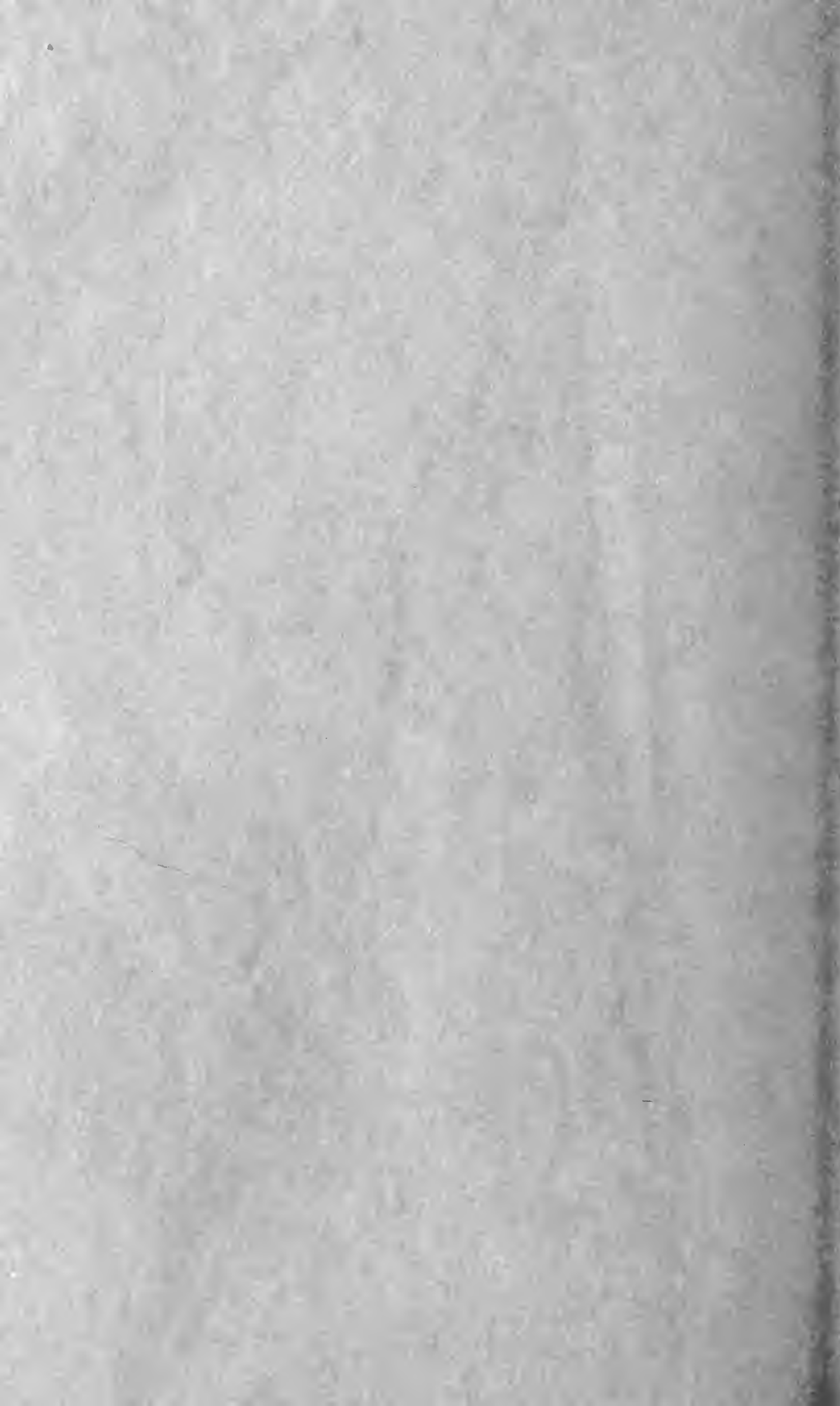

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BRIEF FOR APPELLEE, SOUTHERN COTTON OIL COMPANY.

STATEMENT OF THE CASE.

Appellee Southern Cotton Oil Company, plaintiff below, brought this action against appellant Western Vegetable Oils Company and appellee Southern Pacific Company, to recover the value of a tank car of coconut oil (Complaint, R. 2-7). Southern Cotton Oil Company had purchased the oil from appellee Western Vegetable Oils Company pursuant to a written contract of sale (R. 20).

Appellant Western Vegetable Oils Company loaded the coconut oil into a tank car and delivered it to appellee Southern Pacific Company at Oakland, California, for

transportation by rail to Gretna, Louisiana (Complaint, paragraphs VII and VIII, R. 4-5). The oil was admittedly lost in transit and was never delivered to the buyer, appellee Southern Cotton Oil Company (Complaint, paragraph IX, R. 5).

The complaint alleges that the loss of the oil was due to the negligence of appellant Western Vegetable Oils Company, or to the negligence of Southern Pacific Company, or to the negligence of both of these companies, defendants below (Complaint, paragraph XI, R. 6). The answer of each defendant to the complaint, in effect, charges the other defendant with responsibility for the loss of the oil (R. 7-20). It is obvious that one or both of the defendants is responsible for the loss of the oil, for neither defendant pleads that the loss was due to the fault of appellee-plaintiff, or to an act of God or other excepted cause for which the defendants might not in any event be liable. The action, therefore, presents a three-cornered controversy which requires the presence of the three parties for a proper and final determination.

Appellant alleged in its answer to the complaint that the contract for the sale of the oil provided, by reference to rules not set out in the contract, for arbitration of disputes and prayed for a stay of the action against appellant pending arbitration (R. 15-17).

After filing its answer to the complaint, appellant filed a motion to stay the action as to itself, based on the provisions of Sections 1280 to 1293 of the California Code of Civil Procedure, until an arbitration be had between appellant and appellee Southern Cotton Oil Company (R. 23-25).

The contract between appellant and appellee Southern Cotton Oil Company does not by its terms provide for arbitration (R. 20). Appellant contends that the contract incorporates by reference certain other rules which do contain a provision for arbitration (R. 24).

The motion for a stay of proceedings pending arbitration was presented to the District Court on the pleadings and on affidavits. The affidavits show that the loss of oil occurred during July, 1941; that appellee Southern Cotton Oil Company presented claim for the loss against appellant on January 19, 1942; that the complaint was filed on November 19, 1942; that appellant declined the claim for loss of the oil long prior to the date on which the complaint was filed; that, although appellant mentioned or suggested that arbitration might be advisable, no formal demand or request for arbitration was made by appellant until January 29, 1943, more than two months after complaint had been served on appellant (R. 85-88, 26-36; Court's finding, R. 91-92).

The District Court, after argument and consideration of briefs, denied appellant's motion to stay the action pending arbitration (R. 90-93). The Court's opinion states the following reasons for denial of the motion: (1) The contract does not incorporate the Institute rule providing for arbitration; (2) appellant did not, in any event, submit the dispute to arbitration "immediately", as required by the Institute rule; (3) the pending controversy between the parties is not included within the scope of the arbitration clause relied upon by appellant.

APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT TO RAISE THE POINTS ARGUED.

Appellant sets forth two specifications of error (Brief, p. 6). The second specification of error is simply a statement that the Court below erred in denying appellant's motion to stay proceedings pending arbitration. Such statement is not a specification of a particular error, but a mere conclusion that the decision is wrong.

United States v. Shingle, 91 F. (2d) 85, 91 (9 C.C.A.);

American Surety Co. v. Fischer Warehouse Co., 88 F. (2d) 536, 539 (9 C.C.A.);

Humphreys Gold Corp. v. Lewis, 90 F. (2d) 896, 898 (9 C.C.A.).

Appellant's first specification of error is to the effect that the Court erred in holding that the controversy which is the subject matter of this action does not come within the alleged arbitration clause of the contract. This is a mere statement of a ground of decision. But, even if it be assumed that this is a specification of a particular alleged error on the part of the Court below, such alleged error would not entitle appellant to a reversal of the order from which the appeal is taken. The argument will show that there was no error on the part of the Court below in the respect alleged. However, the order of the Court below may also be sustained on the other grounds, which appellant discusses, but to which it specifies no error. Appellant has set forth no specification of any error which would require a reversal of the order in any event, nor

any specification of errors which, considered together, would require a reversal of the order.

> *Helvering v. Gowran,* 302 U. S. 238, 245, 82 L. Ed. 224, 230;
>
> *Stoody Co. v. Mills Alloys,* 67 F. (2d) 807, 809 (9 C.C.A.).

Appellant's specifications of error are, therefore, insufficient to raise the points discussed in its brief. The lack of proper specifications of error is emphasized by the fact that the various points of argument made by appellant are lumped under the general heading "Statement of the Argument" and are not designated by appropriate headings or summaries indicating the points presented.

SUMMARY OF ARGUMENT.

The order of the District Court denying the motion of appellant to stay proceedings pending arbitration is correct because:

I. The contract does not provide for arbitration, either expressly or by reference to the published Rules and Regulations of the National Institute of Oilseed Products.

II. Appellant is in default in proceeding with arbitration.

III. The issues involved in this action are not referable to arbitration under the alleged arbitration clause.

IV. The arbitration provided for by the Rules of the National Institute of Oilseed Products is common-law

arbitration and hence an agreement to arbitrate thereunder is revocable at any time prior to an award.

V. Appellant's motion for a stay of proceedings is based on the California Arbitration Laws which will not be enforced by the Federal Courts.

ARGUMENT.

I. THE CONTRACT DOES NOT PROVIDE FOR ARBITRATION EITHER EXPRESSLY OR BY REFERENCE TO THE PUBLISHED RULES AND REGULATIONS OF THE NATIONAL INSTITUTE OF OILSEED PRODUCTS.

The first question to be determined is whether the contract (R. 20) between appellant and appellee Southern Cotton Oil Company provides for arbitration at all. The contract, admittedly, does not within its four corners provide for or even *mention* arbitration. Appellant, nevertheless, contends that an arbitration clause is incorporated into the contract by the following reference therein to certain rules:

"This contract is subject to the published Rules & Regulations of the National Institute of Oilseed Products—and which are hereby made a part of this contract, except insofar as such Rules & Regulations are modified or abrogated by this contract."

Appellant has annexed to the affidavit of Adolph Schumann, a set of rules which it states are the rules thus referred to in the contract and which contain a provision for arbitration (R. 37-79). It will be observed at once that the contract refers to the "published Rules & Regulations of the National Institute of Oilseed Products", whereas

the rules by which appellant seeks to invoke arbitration are entitled "National Institute of Oilseed Products, San Francisco, California, U.S.A. Trading Rules effective February 1, 1940". The contract, then, does not even correctly or specifically refer to the rules which appellant now seeks to invoke.

In considering appellant's contention, it must be borne in mind that appellant does not merely seek to add a provision to the contract which is not therein set out, but seeks by incorporation of certain rules by reference to deprive appellee of its right to appeal to the Courts for redress and to substitute therefor the non-judicial award of unnamed arbitrators. The intent or agreement of a party to waive its right to seek the usual remedies afforded by the Courts must be established by clear, specific language, not by implication.

> *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.*, 119 F. (2d) 809, 815 (1 C.C.A.).

In fact under the United States Arbitration Act (9 U. S. Code, Section 3) the Court must be "satisfied" that there is an agreement for arbitration and that the issue involved in the pending suit is referable to arbitration under the agreement.

> *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978, 981 (2 C.C.A.).

The Court below was not satisfied that there was such an agreement (R. 91). The subject of the contract between the parties is a sale of oil. Rules defining contract terms, conditions of shipment, price, quality, etc. are pertinent to such a sales contract. But a rule providing for arbitration is not pertinent to the performance of any

contract and has no bearing on the respective rights or obligations of the parties. An arbitration clause merely provides a means of settling disputes and the parties must contract explicitly for such means before either party will be deprived of the usual remedies afforded by the Courts. When the parties contract that "This contract is subject to the published Rules," etc., it must be deemed that the rules referred to are those pertinent to the performance of a contract for a sale of coconut oil, and not that the parties thereby intended, without even a mention of arbitration, to relinquish their right to appeal to the Courts to protect or enforce their respective rights or obligations.

The alleged incorporating clause does not refer to *all* the rules of the Institute. There are 152 such rules (R. 41-69). A cursory glance at the rules will reveal that a great many of them could have no conceivable relation to the contract here involved. Yet, under appellant's contention, all of these 152 rules are an integral part of the contract.

There are not many authorities discussing the question presented. Apparently persons desiring arbitration in event of a dispute have been careful to provide clearly therefor in the contract. However, the authorities on the point support the position now taken by appellee Southern Cotton Oil Company.

In *Thomas & Co. v. Portsea S.S. Co.,* 12 Aspinall M. C. (N.S.) 23, (1912) A. C. 1, a decision by the English House of Lords, one of the parties to a bill of lading contended that arbitration of a dispute was required by reason of the following clauses in the bill of lading:

"* * * to William Malcolm Mackay or his assigns, he or they paying freight for the said goods with other conditions as per charter-party", and

"Deck load at shipper's risk, and *all* other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause."

The charter-party referred to in the foregoing clauses provided for arbitration of all disputes. However, the Court held that the arbitration clause was not thereby incorporated in the bill of lading. The Lord Chancellor stated:

"The arbitration clause is not one that concerns shipments, or carriage, or delivery, or the terms upon which delivery is to be made or taken; it only governs the way of settling disputes between the parties to the charter-party, and disputes arising out of the conditions of the charter-party, not disputes arising out of the bill of lading. In my opinion the Court of Appeal relied rightly upon the decision in Hamilton v. Mackie (5 Times L. Rep. 677), and, if it is desired to put upon the holders of a bill of lading an obligation to arbitrate because that obligation is stated in the charter-party, it must be done explicitly."

The foregoing decision by the highest English Court is entitled to particular weight by the Federal Courts in the interpretation of a commercial contract.

The Eliza Lines, 199 U. S. 119, 128, 50 L. Ed. 115, 119.

The same question was presented to the Court in *In re General Silk Importing Co.,* 189 N. Y. S. 391. The Court denied a petition for arbitration on the ground that the

contract did not provide for arbitration. A contract for the sale of silk provided that "Sales are governed by raw silk rules adopted by the Silk Association of America". The rules referred to provided that "All differences arising between the buyer and seller must be submitted to the arbitration committee of the Silk Association of America". The Court said, page 395:

> "The only point here is whether this contract shows with sufficient definiteness that the minds of the parties met on this point, and that they intended to adopt the rules of the Silk Association of America, not merely to insure performance of the contract in accordance with those rules, but that, in the event of a controversy, it should be arbitrated in accordance therewith. The parties could have provided for such arbitration, without setting forth all or any of the rules of the Silk Association of America, if they had merely added, to the provision incorporated in the contract to the effect that the sales are to be governed by those rules, a provision that, in the event of a controversy between the parties, it should be arbitrated as provided by the rules, or if the contract had provided in any manner by appropriate phraseology that the reference to the rules was intended to include those providing for arbitration. That, however, was not done; and since it does not appear that the respondent is a member of the association and it fairly appears that appellant is, the contract should not be construed as constituting an agreement between the parties to relinquish all right to appeal to the courts for redress under the contract, and to submit to the determination by arbitration under said rules of any claim either of them might have for a breach of the contract."

The same conclusion was reached on a second appeal (194 N. Y. S. 15), although it then appeared that both parties to the contract were members of the Silk Association of America. The decision was affirmed by the Court of Appeals in 234 N. Y. 513, 138 N. E. 427.

In the instant case it appears from the affidavit of John J. Whelan that appellee Southern Cotton Oil Company is not a member of the National Institute of Oilseed Products, so that the rules of that Institute can be made binding on appellee only by explicit provision therefor in the contract of sale.

In *Bachmann Emmerick & Co. v. S. A. Wenger & Co.*, 197 N. Y. S. 879, the Court considered a contract containing the same provision as that involved in *In re General Silk Importing Co.*, supra, and likewise reached the conclusion that such contract did not incorporate the rule of the Silk Association providing for arbitration.

Appellant cites only one case discussing the incorporation in a contract of an arbitration clause by reference to another document. The other cases cited by appellant are merely examples of incorporation by very specific reference to a particular document or part thereof.

The one case cited by appellant referring to incorporation of an arbitration clause is *Hines v. Ziegfeld*, 226 N. Y. S. 562. That case is clearly distinguishable from the instant case. In that case a contract of employment incorporated all of the provisions of a standard *form of contract* for that type of employment. There was no attempt to incorporate by reference general rules which might or might not be applicable to the specific contract.

The parties simply agreed that their contract was made on a specific form. The agreement signed by the parties was intentionally not the complete contract, but a mere memorandum to be incorporated into a standard form of contract. Further, the parties there specifically agreed *after* the dispute arose, to arbitrate their dispute. It was, therefore, immaterial whether the original contract provided for arbitration or not.

Marine Transit Corporation v. Dreyfus, 284 U. S. 263, 76 L. Ed. 282, cited by appellant, does not discuss or even mention the question now presented. The decision is, of course, no authority on a point neither raised nor discussed. It should be noted that the booking agreement there involved was, as in *Hines v. Ziegfeld,* supra, a mere memorandum making a contract on a standard form of contract, not an attempt to incorporate by reference general rules which might or might not be applicable to the specific contract.

The California cases cited by appellant (Brief, pp. 9-11) do not involve incorporation by reference of an arbitration clause, but are merely examples of incorporation by very specific reference to such specific matters as prices, list of subscribers, or to a particular form of lease. They do demonstrate how simply and specifically appellant could have referred to and incorporated the arbitration provision of the Institute rules in the present contract.

It is particularly significant that the rules alleged by appellant to be a part of the contract herein provide for uniform contracts (Rule 78, R. 56). The uniform contracts are set forth at the end of the rules (R. 71-79). Each of these uniform contracts provides as follows:

> "Clause paramount: This contract is subject to published rules of the National Institute of Oilseed Products adopted and now in force, which are hereby made a part hereof, except insofar as such rules may be specifically abrogated herein, and any dispute arising under this contract shall be settled by a Board of Arbitration selected by the San Francisco Chamber of Commerce and to be judged according to the rules of the National Institute of Oilseed Products, and the findings of said Board will be final and binding upon all the signatories hereto."

The framers of the rules thus recognized that the simple provision now relied upon by appellant is by itself insufficient to incorporate an arbitration clause into a contract and specifically provided for arbitration by additional specific language in the uniform contract.

The contract of sale here involved was drawn on the appellant's printed form which *omits* from the "Clause Paramount" the specific provision for arbitration quoted above. Therefore, as stated by the District Court (R. 91):

> "The omission of this clause in the contract indicates that the parties intended these rules to apply to performance rather than to enforcement."

Since the contract does not provide for arbitration, the District Court properly denied appellant's motion for a stay of proceedings pending arbitration.

II. APPELLANT IS IN DEFAULT IN PROCEEDING WITH ARBITRATION.

The United States Arbitration Act (9 U. S. Code, Sec. 3) and the California Arbitration Act (Code of Civil Procedure, Sec. 1284) both permit a stay of a pending action only in event that "the applicant for the stay is not in default in proceeding with such arbitration".

The question of whether either party is in default in proceeding with arbitration is largely a discretionary one for the District Court.

In *La Nacional Platanera v. North American F. & S. S. Corp.*, 84 F. (2d) 881, 883 (5 C.C.A.), the Court said:

> "Under a reasonable construction of that section of the Act the District Court was vested with discretion to deny the prayer for the reference of the dispute to arbitrators as well as to refuse to stay the suit if he considered plaintiff was in default in proceeding with the arbitration."

The terms of an agreement for arbitration determine to a large extent whether either party is in default in proceeding with arbitration. Institute Rule 64, which appellant contends is incorporated into the contract of sale herein involved, provides that any dispute which cannot be settled amicably between the parties shall *immediately* be *submitted* to arbitration (R. 54). Institute Rule 68 sets forth the form of request for arbitration (R. 55).

The loss for which recovery is sought in this action occurred in July, 1941 (R. 86). Appellee Southern Cotton Oil Company presented claim against both appellant and appellee Southern Pacific Company on August 19, 1941 (Complaint, paragraph X, R. 5, not denied by appellant).

The claim was again presented to appellant on January 19, 1942 (R. 86). Appellant declined to pay the claim long prior to the filing of the complaint herein (R. 29-30, 35). The complaint was filed on November 19, 1942 (R. 7).

Appellant has never requested arbitration on the form provided by Institute Rule 68 and first made a demand on appellee Southern Cotton Oil Company for submission of the controversy to arbitration on January 29, 1943, more than two months after the complaint herein was served on appellant and more than eighteen months after the loss had occurred (R. 85-86).

Appellant makes some contention that it "proposed" arbitration prior to the filing of the complaint (Brief, pp. 21, 23). However, letters attached to the affidavit of Adolph Schumann, appellant's president, show merely that Mr. Schumann thought that an arbitration "might be the sensible thing", or he said "something about arbitration" (R. 29-36). Mr. Schumann also said in his final letter: "It is a matter entirely between the Southern Cotton Oil Company and the Railroad, if we are drawn into it well and good." Appellant was, therefore, apparently quite willing to take its chance in litigation and was not insistent on arbitration.

The affidavit of John J. Whelan shows that Mr. Schumann never made any oral demand or request to him for arbitration in discussing appellee's claim for damages (R. 87-88). Appellant's Mr. Schumann apparently preferred arbitration to litigation, but tried to play fast and loose with appellee Southern Cotton Oil Company, hoping that there would be neither arbitration nor litigation.

The District Court, in a proper exercise of discretion, concluded that appellant was in default in failing to proceed *immediately* with arbitration, as required by Institute Rule 64, which appellant contends is applicable (R. 91-92).

The cases cited by appellant are not in point (Brief, pp. 21-24). In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 70 F. (2d) 297, and in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978, 980, the arbitration agreements merely provided that disputes should be arbitrated. There was no time fixed for arbitration and, hence, the party seeking redress was required to take the initiative. However, the arbitration clause which appellant here contends is a part of the contract requires that any dispute "shall *immediately* be *submitted* to arbitration before a committee selected by the San Francisco Chamber of Commerce". An equal burden is thereby placed on both parties to *submit* the dispute immediately.

If, therefore, Institute Rule 64 applies to the contract here involved, it is clear that appellant is in default in proceeding with arbitration. A demand for arbitration made on January 29, 1943, for arbitration of a controversy arising in August, 1941, is certainly not an immediate submission to arbitration. A party may waive the right to arbitration either before or after suit is filed on the dispute.

> *William S. Gray & Co. v. Western Borax Co.*, 99 F. (2d) 239, 240 (9 C.C.A.).

III. THE ISSUES INVOLVED IN THIS ACTION ARE NOT REFERABLE TO ARBITRATION UNDER THE ALLEGED ARBITRATION CLAUSE.

Before granting a stay of proceedings in an action pending arbitration, the Court must first determine not only whether the contract provides for arbitration at all, but must also be "satisfied" that the issues involved in the pending suit are of such a nature as to be referable to arbitration under the terms of the alleged arbitration clause.

> Section 3, *United States Arbitration Act,* 9 U. S. Code;
>
> *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.,* 119 F. (2d) 809, 814 (1 C.C.A.).

The District Court held that the controversy involved in this action does not in any event come within the terms of the arbitration clause which appellant contends is incorporated into the contract between the parties (R. 92-93).

The clause referred to provides (Rule 64, R. 54):

> "Any dispute arising under contracts which cannot be settled amicably between interested parties shall immediately be submitted to arbitration before a committee selected by the San Francisco Chamber of Commerce under the Rules of the National Institute of Oilseed Products."

The District Court held that the controversy between the parties was not one "arising under contracts" because (R. 92):

> "The solution of the dispute does not involve an interpretation of the contract of sale. Although the contract of sale created the relationship between the

seller and plaintiff, just as the contract of carriage created the relationship between the shipper (carrier) and plaintiff, the action is based on negligence, not on breach of contract. The question to be determined is whether there is negligence of the seller or of the shipper (carrier) or of both which caused the loss. Assuming for the moment that it was the negligence of the seller, no term of the contract, no provision for the placement of the risk of loss, would be a defense, so that the dispute is not under the contract but outside of it."

It is true, as appellant states (Brief, p. 16), that the contract for the sale of the oil created the relationship, or more correctly *a* relationship, between appellant and appellee Southern Cotton Oil Company—that of seller and buyer. It is equally true, as stated by the District Court, that appellant cannot and does not rely upon the contract to exonerate it from liability against the allegation of negligence. The duties which appellant concedes it had to perform are not duties specifically set forth in the contract. They are duties implied by law from the relationship of the parties. Since appellant concedes the onus of the duties, there is no "dispute arising under the contract", as to the rights or obligations of the parties. The issue is simply whether appellant was guilty of negligence which caused or contributed to the loss of the shipment of oil. The arbitration rule, relied on by appellant, does not purport to include that question.

In *Young v. Crescent Development Co.*, 240 N. Y. 244, 148 N. E. 510, a building contract provided that: "All questions that may arise under this contract and in per-

formance of the work thereunder shall be submitted to arbitration at the choice of either of the parties hereto." The contractor sought to submit to arbitration claims for damages because the owner had delayed the contractor in performing the contract. The Court held that the claim for damages by reason of delay caused by the owner was not embraced in the arbitration clause. The Court said:

> "According to respondents' theory the acts done by appellant were not done under and in performance of the contract, but in violation of it and in repudiation of its provisions. There is involved no interpretation of its meaning, but a willful refusal to be bound by and, as it seems to me, this clause was intended to cover controversies which do not deny but seek an interpretation of and submission to its provisions; an attitude which seeks action under the contract and not one outside of and in denial of it."

Certainly a claim for damages based on negligence is, even more than a claim based on delay, outside of the contract.

In *Wilson v. Curlett,* 140 Md. 147, 117 Atl. 6, 9, a seller brought an action against the buyer for the price of a lot of canned tomatoes delivered pursuant to a contract of sale. The buyer denied liability on the ground that the seller had failed to deliver the whole lot of tomatoes called for by the contract. The buyer also contended that the action should be abated because the contract provided that "all disputes under this contract shall be arbitrated in the usual manner". The Court held that an action by the seller for the price was not within the scope of the arbitration clause, stating:

> "The contract in question contains a number of provisions under which disputes might have arisen, and the clause in question was doubtless intended to cover such disputes. There is nothing in the agreement to indicate that the parties intended to submit to arbitrators their ultimate right to the enforcement of the agreement, and even if it be assumed that an express stipulation to that effect would be sustained by the courts, we cannot hold that such right is covered by the clause referred to so as to make arbitration a condition precedent to a suit for the enforcement of the contract."

The above cases show, we believe, that an action for the value of the oil based on appellant's negligence is, as held by the District Court, outside the scope of the alleged arbitration clause.

The determination of whether a particular issue or dispute is within the scope of a particular arbitration agreement depends to a great extent upon the language of the agreement and the nature of the dispute under consideration. We, therefore, see no reason to discuss the cases cited by appellant as to the scope of various other arbitration agreements (Brief, pp. 16-19). None of these cases appear to bear any persuasive analogy to the questions now presented.

The controversy here involved is outside the scope of the contract for an additional reason. Institute Rule 33 provides (R. 47):

> "Rule 33.—Loss of Shipment. Should shipment or any portion thereof, be lost, contract to be void to the extent of such quantity."

If the arbitration clause contained in the Institute rules is incorporated in the contract as appellant contends, then Rule 33 must likewise be so incorporated. Admittedly the shipment here involved was lost. If the contract then became void, pursuant to Rule 33, there is nothing left to arbitrate. Obviously, appellant must return the consideration paid under a void contract.

6 *Cal. Jur.*, page 28.

Hence, no arbitrable controversy is presented. Thus in *B. Fernandez & Hnos v. Rickert Rice Mills,* 119 F. (2d) 809 (1 C.C.A.), a contract for the sale of rice provided for arbitration as follows:

> "Arbitration—Both buyer and seller hereby agree to submit all questions of quality, complaints, disputes and/or controversies that may arise out of or in connection with this contract, in the following manner:"

The contract also provided that a certain certificate should be conclusive as to quality. The certificate when issued stated that the rice was inferior in quality to that called for by the contract. The buyer contended that it was entitled to reject such inferior shipment. The seller contended that the parties had to arbitrate the damage due to the inferior quality of the goods. The Court held, despite the broad language of the arbitration clause, that the buyer was entitled to reject the shipment and was not required to arbitrate the amount of damages suffered by reason of the inferior quality of the rice, since the certificate was final on the question of quality.

The Court said, page 815:

> "A party is never required to submit to arbitration any question which he has not agreed so to submit,

> and contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to submit."

Likewise, here, where Rule 33, if incorporated in the contract as appellant contends, provides that the contract is to be void should the shipment be lost, the rule is conclusive. Appellee does not have to submit to arbitration its right to recover the amount paid under the avoided contract, since that right inevitably follows from Rule 33.

Furthermore, as pointed out by the Court below, arbitration cannot determine the issues involved in the pending action (R. 92). An arbitration clause obviously does not embrace in its scope an issue which cannot be disposed of by arbitration. Section 3 of the United States Arbitration Act (9 U. S. Code, Section 3) clearly gives discretion to a Court in determining whether the issue involved in an action is referable to arbitration. The proper exercise of such discretion does not require the granting of a stay of the trial of the action to permit the performance of an idle act.

Appellee Southern Pacific Company is not a party to the contract in question and cannot be compelled to arbitrate the issues involved in this action. If the appellant were to receive an award from arbitrators, appellee Southern Cotton Oil Company could still proceed against appellee Southern Pacific Company who could nevertheless implead appellant in the pending action and show that the damage was due to the negligence of appellant. If appellee Southern Cotton Oil Company received an award, the appellee or appellant could still proceed against

appellee Southern Pacific Company and show that the loss was due to the latter's negligence. In either event, the Court might also find that the loss was due to the neglect of both defendants. The award of the arbitrators might and could, therefore, be rendered a nullity.

Marine Transit Corp. v. Dreyfus, 284 U. S. 263, 275, 76 L. Ed. 282, 289, does not, as asserted by appellant, show that it is proper to refer to arbitration a portion of the dispute between the parties. On the contrary, the Court pointed out that there was no reason to split the action as to the claim *in personam* and as to the claim *in rem* because the Marine Transit Corporation was bound to the arbitration agreement both as respondent *in personam* and as claimant of the vessel *in rem.* The Court pointed out that the action had been previously dismissed as to a third person.

We, therefore, respectfully submit that the District Court exercised proper judicial discretion in concluding that the issues involved in this action do not come within the scope or terms of the alleged arbitration clause.

IV. THE ARBITRATION PROVIDED FOR BY THE RULES OF THE NATIONAL INSTITUTE OF OILSEED PRODUCTS IS COMMON-LAW ARBITRATION AND HENCE AN AGREEMENT TO ARBITRATE THEREUNDER IS REVOCABLE AT ANY TIME PRIOR TO AN AWARD.

However, even if it be determined that the contract does provide for arbitration, that appellant has not waived its alleged right to arbitration and that the controversy involved in the present action is within the scope of the alleged arbitration clause, appellant is still not entitled to

a stay of this action. For, appellee Southern Cotton Oil Company has revoked and was entitled to revoke the arbitration clause, if there be one, in the contract.

Two methods of arbitration are recognized in California: Common-law arbitration and statutory arbitration.

Christenson v. Cudahy Packing Co., 198 Cal. 685, 692;

Dore v. Southern Pacific Co., 163 Cal. 182, 188;

Riccomini v. Pierucci, 54 Cal. App. 606, 608;

Water District v. Spring Valley Water Co., 67 Cal. App. 533, 540.

The Federal Courts likewise recognize the two methods of arbitration.

Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F. (2d) 1038, 1039.

Sturges on Commercial Arbitration & Awards (1930), page 2, states:

> "The view is almost uniformly held that parties may arbitrate under common law rules notwithstanding the existence of an arbitration statute. The arbitration statutes of the different jurisdictions are regarded as merely cumulative. Parties may choose either method. They may manifest their purpose to arbitrate under the arbitration statute of a given jurisdiction by executing a written arbitration agreement according to the requirements of the statute. If they do not so manifest their purpose common-law rules of arbitration generally control."

The difference between the two methods of arbitration which is important in this case is that an agreement for or submission to common-law arbitration is revocable by

either party prior to an award, whereas an agreement for statutory arbitration may, by virtue of a statutory provision, be irrevocable.

> *Christenson v. Cudahy Packing Co.,* 198 Cal. 685, 692;
>
> *Key v. Norrod,* 124 Tenn. 146, 136 S. W. 991, 992;
>
> *Hughes v. National Fuel Co.,* 121 W. Va. 392, 3 S. E. (2d) 621, 624.

The terms of the agreement for arbitration ordinarily determine whether the parties intended the arbitration to be statutory or common law.

Institute Rules 64 to 76, which appellant contends is part of the contract of sale, definitely provide for a common-law arbitration (R. 54-56). The rules refer to no statutory procedure at all, so that the only statutory procedure which could conceivably have any application is The United States Arbitration Act (9 U. S. C. A., Secs. 1-15), or the California Arbitration Law (*Code of Civil Procedure,* Secs. 1280-1293). We shall refer to these acts in showing that the rules which appellant seeks to invoke provide for a common-law arbitration.

We do not contend that an arbitration clause must provide specifically for arbitration pursuant to a particular statute or adopt specifically the procedure of a particular arbitration statute in order to qualify as statutory arbitration. An arbitration clause in a contract, executed as required by the particular statute invoked, may, perhaps, qualify under that statute without any specific reference to the statute at all. However, we do say that an arbitration clause which does not refer to any arbitration statute at all and which directly or necessarily negatives the

intended application of an arbitration statute provides only for common-law arbitration. In this respect, it must be noted that the Institute rules for arbitration, on which appellant now relies, do not provide merely for arbitration in general terms but set up a comprehensive procedure intended to be complete and final in itself.

The Institute rules provide for a common-law arbitration instead of a statutory arbitration for the following reasons:

1. The rules for arbitration make no mention whatever of any statutory procedure or of any statute governing arbitration. On the contrary, and even more significant, Rule 64 expressly provides that the arbitration is to be "under the Rules of the National Institute of Oilseed Products". The application of any statutory procedure is thus expressly negatived.

In *Carey v. Herrick,* 146 Wash. 283, 263 Pac. 190, 193, the Court said:

> "It should be noticed at the outset that there is nothing in the original agreement from which it can be inferred that the arbitration was to be statutory. It is totally silent upon the question. Assuming that the matter is one capable of being submitted to statutory arbitration, the parties had the choice of either method, statutory or common law. The absence of any words, indicating a statutory one would lend support to the belief that it was to be at common law. But perhaps a better way determining the intention of the parties is to see whether the instrument itself provided for action according to the statute or contrary thereto."

Likewise in *Water Dist. v. Spring Valley Water Co.,* 67 Cal. App. 533, 540, the Court said:

> "It is evident from the terms of said agreement that there was no intention of the parties to bring themselves within an arbitration provided for by the code (sec. 1283 et seq., Code Civ. Proc.). In fact no such contention is made by appellants. Their agreement was in the nature of a common-law submission to arbitration, a voluntary withdrawal of the case from the jurisdiction, by which the court lost all control over the case and had no authority to enter judgment, providing the settlement was reached by said arbitrators, which, as we have already seen, was accomplished."

2. Rule 68 (R. 55) provides that each party to the arbitration "hereby agrees and promises to abide by the award and findings of the arbitrators, and in the event of an adverse decision, to make prompt settlement and likewise pay the fees and costs as provided for in the rules of said Institute". Rule 76 (R. 56) contains a similar provision of finality to the arbitrators' award.

The rules contain no provision whatever for recourse or appeal to the Courts after an award. On the contrary, Rules 68 and 76 not merely provide that the award is final, but provide that prompt payment of the award be made and impose a penalty for failure to make such payment.

Both The United States Arbitration Act (9 U. S. C. A., Secs. 10, 11 and 12), and the California Arbitration Law (*Code of Civil Procedure,* Secs. 1288, 1289, 1290, 1291)

provide for an application to the Court to vacate, modify or correct an award.

The Institute rules not merely do not provide for such application but expressly negative the right to make any such application. The right to make such application is one of the essential elements of statutory arbitration.

In *Carey v. Herrick*, 146 Wash. 283, 263 Pac. 190, 193, the Court said:

> "* * * We have heretofore set out the arbitration agreement providing that the findings of the arbitrator shall be 'final, conclusive and binding upon the parties'. If the parties had intended that this was to be statutory they knew that it could not be final and conclusive, but that it could be vacated upon numerous grounds set forth in the statute as well as modified and corrected for many more. The parties could not by stipulation deprive the court of its power to set aside a statutory award for any or all of the grounds provided in the statute.
>
> "* * * We need go no further to decide this question than to examine the agreement itself. If it fails to provide for statutory arbitration and contains provisions contrary to the statute we shall not legislate the parties under it. What they have failed to do the court cannot do for them."

In *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F. (2d) 1038, 1039, the Court of Appeals for the District of Columbia said:

> "This plaintiff seeks a summary statutory process in derogation of common-law rights, procedure, and trial by jury, but such a plaintiff must bring himself

clearly within his statute before he is entitled to its remedy.

* * * * * * *

"And when these parties were making their agreement for arbitration, it was easy enough to stipulate themselves within the statute by an agreement for judgment on motion, if they so intended, but they failed to do so."

In *Christenson v. Cudahy Packing Co.*, 198 Cal. 685, 692, the Court said:

"But even if this procedure had been followed, the arbitration not having been made in accordance with the provisions of the Code, and being simply a common-law arbitration, the appellant could have revoked the submission thereof and refused further to participate in the proceeding."

In *Park Construction Co. v. Independent School Dist.*, 209 Minn. 182, 296 N. W. 475, 476, the Court said:

"* * * The agreement for arbitration and the proceedings in pursuance to it failed in so many respects to meet the requirements for statutory arbitration under 2 Mason's Minn. St. 1927, Secs. 9513 et seq., that it is impossible to suppose an intention to proceed thereunder."

To the same effect are:

Key v. Norrod, 124 Tenn. 146, 136 S. W. 991, 992;

Hughes v. National Fuel Co., 121 W. Va. 392, 3 S. E. (2d) 621, 624;

Andrews v. Jordan, 205 N. C. 618, 172 S. E. 319, 322;

Fidelity & Deposit Co. v. Waltz, 253 N. Y. S. 583.

3. Institute Rule 71 (R. 55) provides that the arbitration shall be submitted on written statement of facts, together with written arguments and that no oral evidence nor personal appearance of the parties shall be permitted *unless requested by the arbitrators.*

The California Arbitration Law (*Code of Civil Procedure,* Secs. 1286, 1288 (c)) and the United States Arbitration Act (9 U. S. C. A., Secs. 7, 10(c)) both recognize the *right* to a hearing before the arbitrators and the presentation of oral testimony. The Institute rules thus distinctly deny the application of the statutory rules to arbitration under the Institute rules and, in so doing, deprive the parties of a particularly valuable right recognized by the statutes. The authorities cited under point 2 above show, therefore, that the Institute rules provide only for a common-law arbitration.

4. Institute Rule 74 (R. 56) provides that the award shall be in writing and signed by the arbitrators. The California Arbitration Law (*Code of Civil Procedure,* Sec. 1287) requires that an award must be acknowledged in order to receive confirmation by the Court. An award which is not acknowledged is a mere common-law award.

Hines v. Ziegfeld, 226 N. Y. S. 562.

It thus appears that the Institute rules not only do not provide for statutory arbitration but provide for a procedure which rejects or conflicts with the statutory procedure in important respects. The Institute rules, therefore, obviously provide only for a common-law arbitration.

It is clear that the Court will not enforce specifically or grant a stay of an action upon a contract providing for arbitration which is not governed by statute.

Tatsuuma Kisen Kabushiki Kaisha v. Prescott, 4 F. (2d) 670 (9 C.C.A.).

Further, either party to a contract providing for a common-law arbitration may revoke such provision at any time prior to award. Appellee Southern Cotton Oil Company has revoked such provision, if there be one, by bringing this action.

La Nacional Platanera v. North American F. & S. S. Corp., 84 F. (2d) 881, 882 (5 C.C.A.);

William S. Gray & Co. v. Western Borax Co., 99 F. (2d) 239 (9 C.C.A.);

The Belize, 25 F. Supp. 663, 664 (S.D.N.Y.).

There is, therefore, no arbitration provision remaining in the contract to furnish the basis for appellant's motion to stay this action.

V. APPELLANT'S MOTION FOR A STAY OF PROCEEDINGS IS BASED ON THE CALIFORNIA ARBITRATION LAWS WHICH WILL NOT BE ENFORCED BY THE FEDERAL COURTS.

Appellant states in its brief, pages 11-12, that both The United States Arbitration Act (9 U. S. C. A., Sec. 3) and the State of California Arbitration Law (*Code of Civil Procedure,* Sec. 1284) permit the Court to order a stay of proceedings pending arbitration. Appellant is in error. The Federal Courts will not enforce a state arbitration statute.

The Federal Courts will not specifically enforce an arbitration agreement pursuant to a state arbitration

statute because such a statute is purely remedial and does not establish a substantive right.

> *California Prune & Apricot Growers' Ass'n v. Catz-American Co.*, 60 F. (2d) 788 (9 C.C.A.).

The contract here provides that it is to be governed by the laws of California (R. 22). Hence the District Court could not specifically enforce the alleged arbitration clause.

> *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 70 F. (2d) 297, 298 (2 C.C.A.).

The above decision likewise assumes that the Federal Courts will not even grant a stay of proceedings pursuant to a state arbitration statute, but only pursuant to the United States Arbitration Act. The California Arbitration Law, therefore, does not provide the basis for any remedy to appellant in the case at bar.

Appellant, however, has based its motion for a stay of proceedings herein wholly on Section 1284 of the California Code of Civil Procedure, and not upon Section 3 of the United States Arbitration Act (R. 23-25). Appellant cannot now shift its grounds of motion to rely on the latter act. Grounds for a motion not stated in the motion are waived.

> *Nevada Co. v. Farnsworth*, 89 Fed. 164, 167 (C.C. Utah);
>
> *Roloff v. Perdue*, 31 F. Supp. 739, 743 (N.D. Ia.).

It will be noted that in *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, supra, on which appellant leans so heavily, the defendant moved to stay the action pursuant to Section 3 of the United States Arbitration Act, not pursuant to a state statute.

We submit that appellant is bound by the grounds stated in its motion for a stay of the action.

CONCLUSION.

The authorities cited and discussed above hold that arbitration agreements are to be strictly construed. An agreement to arbitrate should not be read into a contract by implication and the scope of an arbitration agreement should not be extended by implication.

We, respectfully, submit that the points discussed in the foregoing brief show that the District Court was required to deny the motion for a stay of proceedings pending arbitration. The record and applicable law show that appellant is not entitled to arbitrate the issues presented in the action, but, in addition, the three-cornered controversy presented in this action is of such a nature that arbitration could not finally dispose of it, nor aid in its ultimate solution. The District Court properly exercised its judicial discretion in denying appellant's motion.

Appellee Southern Cotton Oil Company respectfully submits that the order appealed from should be affirmed.

Dated, San Francisco,
August 27, 1943.

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No. 10,455

IN THE 7

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN VEGETABLE OILS COMPANY, INCORPORATED (a corporation),

Appellant,

vs.

SOUTHERN COTTON OIL COMPANY (a corporation), SOUTHERN PACIFIC COMPANY (a corporation),

Appellees.

APPELLANT'S REPLY BRIEF.

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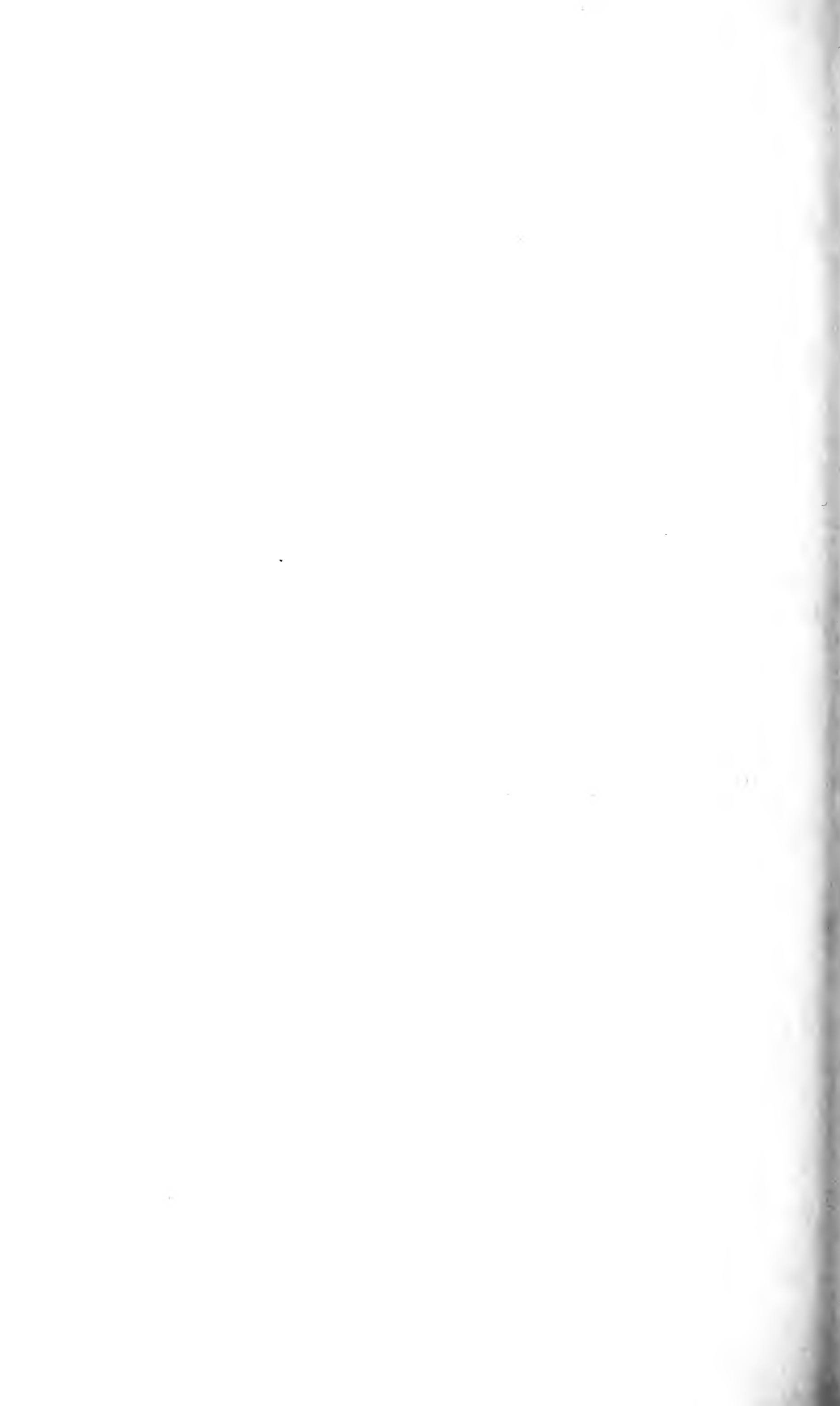

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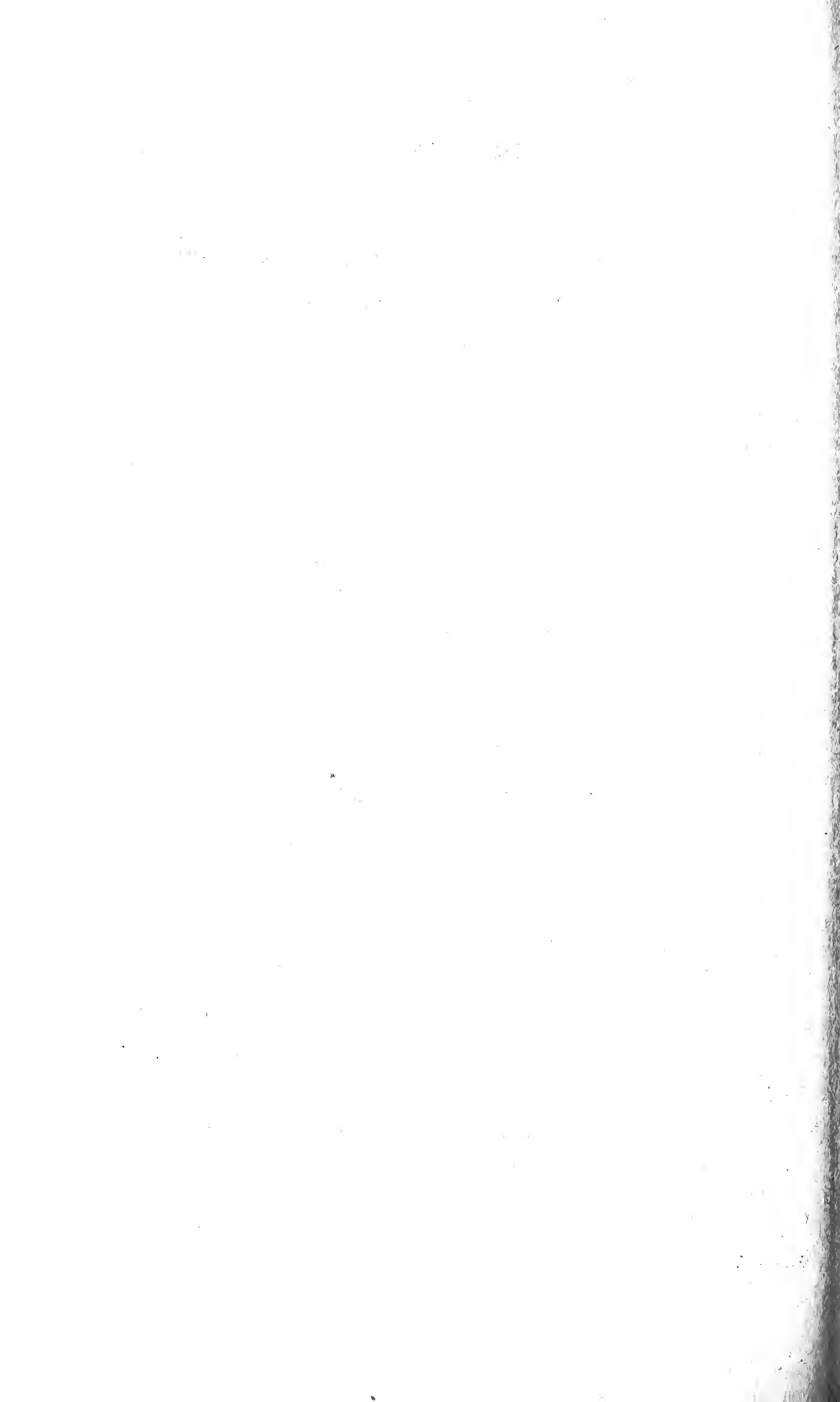

No. 10,455

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Western Vegetable Oils Company, Incorporated (a corporation),
Appellant,

vs.

Southern Cotton Oil Company (a corporation), Southern Pacific Company (a corporation),
Appellees.

APPELLANT'S REPLY BRIEF.

I.

ANALYSIS OF BRIEF FOR APPELLEE SOUTHERN COTTON OIL COMPANY.

The brief for appellee Southern Cotton Oil Company, filed herein, can be divided into two main portions as follows:

(1) A procedural contention that the specifications of error in appellant's brief are insufficient.

(2) Appellee's argument on the merits of this appeal.

These two portions of the brief for appellee will be dealt with separately.

II.

APPELLEE'S CONTENTION THAT APPELLANT'S SPECIFICATIONS OF ERROR ARE INSUFFICIENT.

This appeal is from an order of the District Court denying appellant's motion to stay proceedings in the District Court. The District Court's order denying the motion took the form of a "Memorandum and Order Denying Motion to Stay Trial." (Tr. p. 90.) The memorandum is in the nature of an opinion in which various of the considerations which were in the mind of the Court are discussed, and is followed by the District Court's order denying appellant's motion. It is from this order that the appeal is taken. This order is the action of the District Court involved in this appeal, is the error of the court to be considered upon this appeal and is thus the only error which it is necessary to specify.

Appellee cites several cases all relating to assignments of error upon appeals from decisions of District Courts after full trial on the merits. Since assignments of error are no longer necessary upon appeals to the Circuit Court of Appeals, the pertinence of any of these cases may well be doubted. However, even if it is proper to apply principles involving assignments of error committed in the course of a

full trial on the merits to the specifications of error now required by the rules of the Ninth Circuit to be set forth in briefs on appeal, the cases cited by appellee are not in point. The District Court's action in denying appellant's motion does not resemble the action of a court in admitting or excluding evidence offered in the course of a trial or in making findings of fact or in drawing conclusions of law. It does resemble an action of a court upon a motion for judgment upon the pleadings or upon a demurrer.

It is a sufficient assignment of error to state that the court erred in sustaining a demurrer.

Judge v. Pullman, 209 Fed. 10;
Smith v. Royal Insurance Co., 93 Fed. (2d) 143 (9 C.C.A.).

It is likewise a sufficient assignment of error to state that the court erred in overruling a demurrer.

Mitsui v. St. Paul Fire & Marine Insurance Co., 202 Fed. 26 (9 C.C.A.).

It is a sufficient assignment of error to state that the court erred in granting a motion for judgment on the pleadings.

Klink v. Chicago R. I. & P. Railway Company, 219 Fed. 457.

Finally, it is well established, as shown by *Stoody Co. v. Mills Alloys,* 67 Fed. (2d) 807 (9 C.C.A.), a case cited by appellee, that error is not assignable to the opinion of the court, since what is subject to review is what the court did, and not what it said nor

the reasons it gave for its judgment. A reading of the District Court's "memorandum" which preceded its order leads to various assumptions as to why the court thought the motion of appellant should be denied, but these assumptions are matter for argument not for specification of error. A possible exception is the statement of the District Court immediately preceding its order denying the motion that "I am of the opinion that the controversy does not come within the terms of the arbitration clause,". In order to meet a possible contention that this language is to be construed as a part of the court's judgment appellant has assigned it as error. Appellee can hardly complain of this additional, and unnecessary, specification of error.

III.

APPELLEE'S ARGUMENTS ON MERITS.

This portion of the appellee's brief may again be divided into two parts:

(a) Appellee's attempts to refute appellant's contentions.

(b) New matter.

Appellant contended as shown by appellant's statement of points (Tr. p. 107) that the controversy which is the subject matter of the action brought by appellee arises from a contract providing for arbitration, that the controversy is one which is referable

to arbitration under the contract and that appellant has not waived its right to such arbitration.

Appellee contends that the contract does not provide for arbitration apparently on the ground that the rules of the National Institute of Oilseed Products, which include the rules providing for arbitration, are not sufficiently incorporated by reference in the contract itself and, apparently, on the ground that even if the rules of the National Institute of Oilseed Products are to be treated as a part of the contract the rules respecting arbitration are not.

To support its contention that there is insufficient incorporation of these rules in the contract by reference appellee cites *General Silk Importing Co.,* 189 N. Y. S. 391 and *Bachmann Emmerick & Co. v. S. A. Wenger & Co.,* 197 N. Y. S. 879. Both of these cases are of the type referred to on page 8 of appellant's brief as having been specifically distinguished in *Hines v. Ziegfeld,* 226 N. Y. S. 562 (1928). The distinction between these cases and *Hines v. Ziegfeld,* supra, is that in these cases the arbitration clause was contained in a separate document which was not stated to be made a part of the agreement out of which the dispute arose. The contract between appellant and appellee contains the specific statement that the published rules and regulations of the National Institute of Oilseed Products "are hereby made a part of this contract,". In *Hines v. Ziegfeld,* supra, the language was the same and the court based its decision in part upon this language.

Appellee attempts further to distinguish *Hines v. Ziegfeld,* supra, by maintaining that the agreement of employment constituted no more than an agreement to enter into the actor's equity form of contract containing the arbitration clause. An inspection of this decision will show that such is not the case, that the agreement between the parties was complete in itself, and that the reference to the actor's equity form of contract was in all respects the same as the reference in the contract between appellant and appellee to the published rules of the National Institute of Oilseed Products. Furthermore, *Hines v. Ziegfeld,* supra, was specifically decided upon the original agreement of employment and not upon any subsequent agreement to arbitrate the controversy.

To support its claim that only some of the published rules and not those requiring arbitration became a part of the contract here involved appellee cites *Thomas & Co. v. Portsea S.S. Co.,* 12 Aspinall M. C. (N. S.) 23 (1912). It is difficult to see any resemblance between the bill of lading in that case and the contract in the case at bar. There the charter party contained a provision respecting the arbitration of disputes arising from breach of a charter party whereas the dispute in question arose between parties to a bill of lading. The rights and duties of shipper and holder of a bill of lading and the rights and duties of the parties to a charter may be, and frequently are, very different. Appellant and appellee were respectively seller and buyer under a contract

of sale and the published rules and regulations of the National Institute of Oilseed Products all relate to the rights and duties of persons bearing exactly that relationship to one another. The intention of these parties to be bound by all of these published rules is plain.

Appellee's attempt to maintain that the controversy here involved is not referable to arbitration under the arbitration clause is fully discussed in appellant's brief, pp. 14 to 20. It is well to note, however, that appellee seems to rely heavily upon *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.*, 119 F. (2d) 809, 814 (1 C.C.A.). That this case has no application at all to the situation created by the contract between appellant and appellee is obvious even from an inspection of appellee's quotations. The arbitration clause involved in *B. Fernandez & Hnos v. Rickert Rice Mills, Inc.*, supra, required arbitration of disputes as to quality, but the contract provided that a certain certificate as to quality should be conclusive. There was thus a square conflict between two different provisions of a contract which required the court's interpretation. The court rightly held that the particular provision with respect to the certificate of quality controlled the general provision regarding arbitration. Furthermore, in this case one of the parties apparently contended that the arbitrators, and not the court, had the power to decide whether the controversy came within the arbitration clause. No such contention is necessary in the case at bar as that very

question is involved upon this appeal and it is appellant's position that the District Court was wrong in its decision that the controversy is not referable to arbitration under the arbitration clause with which we are here concerned.

Appellee also contends that the appellant was in default in proceeding with the arbitration at the time this action was commenced. We believe that appellant has completely disposed of this contention in its brief, pp. 21-25. It is perfectly plain upon the authorities there cited that the party to a contract in appellant's position is not in default in proceeding with arbitration and has not waived its rights to arbitration if the defense is raised by answer in a suit brought upon the contract. When this dispute arose appellee and not appellant had the burden of going forward. Appellee made claims upon appellant which appellant believed and still believes are unjustified. If appellee wished to press those claims by any action beyond correspondence it was the duty of appellee to assert the claims in the manner provided in the contract, namely, by referring the claims to arbitration. Instead, it chose to bring suit. It is thus appellee and not appellant who is in default under the provisions of the contract requiring arbitration. The burden of submitting the dispute to arbitration was not upon appellant but upon appellee, the claimant and moving party, and the party upon whom the burden of going forward always rests.

Under the heading of "New Matter" may be placed the appellee's argument that the contract between appellant and appellee provided for "common law" arbitration. Appellee seems to deduce that, if the arbitration provided for was "common law" arbitration, appellee revoked the agreement to arbitrate by bringing suit.

Whether a given arbitration agreement is "statutory" or "common law" is a question not only of the terms of the agreement, but also of the terms of the statute governing such matters. The arbitration statute in any particular jurisdiction may be so narrow and restrictive, as most of the earlier arbitration statutes were, that to come within it the agreement of the parties must practically incorporate the statutory terms. The statute may, however, be so broad and general, as the present New York, Federal and California statutes are, that most if not all agreements relating to arbitration fall within its provisions. It is the plain intent of these later statutes to give legislative sanction and implementation to virtually every sort of arbitration agreement even though the terms of the statute are not copied into the agreement.

Many cases have held that a common law arbitration can exist side by side with an arbitration under the statute, i.e., that a contract for arbitration may be made, valid as a common law arbitration, even though invalid for some reason under the particular arbitration statute. Thus the inquiry as to whether

an arbitration agreement is "common law" or "statutory" is usually to determine whether it is valid at common law though not so under the statute, or valid under the statute though not so at common law. As shown by the California cases cited by appellee these principles developed in the course of upholding arbitration agreements as valid at common law against attack on the ground that they did not meet the requirements of the statute. Appellee attempts to use this principle for the opposite purpose, to evade an arbitration agreement on the ground that it provided for arbitration at common law, was revocable, and is revoked by bringing action.

It may well be doubted whether under the California law since 1927 statutory and common law arbitration continued to exist side by side where future controversies are involved. No California cases have decided this question since 1927. All of the cases cited by appellee were decided under the older law which bears virtually no resemblance to the present statute.

The present Section 1280 of the Code of Civil Procedure is general, mandatory, and substantive in its terms stating that "a provision in a written contract to settle by arbitration a controversy thereafter arising * * * shall be valid, enforceable and irrevocable". There is no requirement as to the form of the agreement except that it appear in a written contract. Section 1282, in providing for the enforcement of such an agreement states "if the finding be that a

written provision for arbitration was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance *with the terms thereof"*. Again Section 1284 relating to stays of civil actions provides for the stay until the arbitration has been had *"in accordance with the terms of the agreement"*. The remaining sections of the present act are permissive, procedural and designed to implement the general law if the parties wish to use them.

An examination of these provisions leaves little room for the contention that the agreement itself must provide specifically for and incorporate within its terms every procedural step permitted by the statute in order to avoid being a common law arbitration and therefore revocable.

The law as it stood at the time the California cases cited by appellee were decided was very substantially different. No Section 1280 existed at all. No provisions appeared anywhere in the statute similar to those of Section 1282. Section 1283, prior to 1927, merely provided that a submission to arbitration was irrevocable only when filed with the County Clerk. The only sections of the older law having any resemblance to the present were Sections 1287 and 1288, relating to vacation and modification of the award by the court for various errors committed by the arbitrators. The present Sections 1288 and 1289 roughly correspond. It is obvious from a comparison of these sections that very many written contracts providing

for arbitration could, prior to 1927, fail to meet the exacting specifications of the statute, particularly where future disputes were concerned. The California cases cited by appellee are all examples of the upholding of such agreements as valid common law submissions when the rigid requirements of the older statute were not met. They decide nothing pertinent here.

In fact, the conclusion is inescapable that whether or not common law arbitration any longer exists in California side by side with "statutory" arbitration, all arbitration agreements, embodied in a written contract, except those pertaining to labor, are irrevocable, whether or not they use the exact language of the statute.

Appellee also cites *Lehigh Constructural Steel Co. v. Rust,* 59 Fed. (2d) 1038. This case involved the United States Arbitration Act which contains a provision absent from the California law that summary judgment upon an award may be had when the parties have so agreed. The parties had not so agreed and the court denied a motion for summary judgment. The court did not say that failure so to agree rendered the whole agreement invalid under the statute.

Carey v. Herrick, 263 Pac. 190 (Wash.), likewise cited by appellee, was decided under the Washington statute wholly unlike the California present law and bearing more resemblance to the older California law. Further, as shown by *Fisher Flouring Mills v. U. S.*, 17 Fed. (2d) 232, the Washington courts have held

that there is no common law arbitration in Washington and that the statutory methods there are exclusive. In so far as the case is relevant here, it supports the view that there is no longer common arbitration in California.

We have already pointed out that the written agreement providing for arbitration need not spell out every right or privilege given a party by the statute. We should also point out, however, that what appellee seems to consider deviations in the agreement from the statute are not such. Under the agreement oral evidence and personal appearance may be requested by the arbitrators. Under the statute the arbitrators may make the same requirement. The right to make such requirement is not denied to the arbitrators by the agreement. The agreement does not require acknowledgment of the award. Neither does the statute, which only provides that the award must be acknowledged if an application be made thereon for an order of court confirming it. This might be done at any time and certainly the agreement does not forbid it.

In *Marine Transit Corporation v. Dreyfus,* 284 U.S. 263, 76 L. Ed. 282, the court held that where the agreement for arbitration stipulates that the award should be "final and binding", but does not stipulate that under the United States Arbitration Act judgment may be entered upon the award the arbitration agreement is valid under the statute. In *In re Resolute Paper Products Corp.,* 290 New York

Supp. 87, the court held that under the New York law a submission to arbitration was statutory even though the agreement of submission made no reference to the entry of judgment upon the award. The court pointed out that omissions from the agreement such as this are omissions of permissive, not mandatory, provisions and do not affect the validity of the arbitration agreement. It is noteworthy that the agreement in this case provides nothing more than this.

Also in the category of new matter is appellee's contention that Rule 33 of the published rules and regulations of the National Institute of Oilseed Products in some manner eliminates the necessity for arbitration.

An inspection of the language of Rule 33 shows the contrary. The language is that if a shipment is lost "contract to be void *to the extent of such quantity*". The plain meaning of this provision is merely that if a portion of a shipment is lost the buyer is not to be required to receive, nor the seller to supply an additional quantity sufficient to make up the loss. It has no bearing upon the provisions of the contract generally and no bearing whatever upon the responsibility of one of the parties to the other for the loss. Sales of vegetable oils are made under certain price and market conditions and to meet certain requirements of buyer and seller. To require the *quantity* of a lost shipment to be subsequently delivered or

received could in many instances unduly increase the burden of the loss to the party responsible therefor. It is to avoid this result that this rule is so worded. It should be pointed out that in this case the contract provides that the sale is made "f.o.b." Oakland. In these circumstances the risk of loss is to be borne by the buyer, as Rule 7 of the National Institute of Oilseed Products specifically states. It is obvious that the loss suffered by the buyer could be greatly increased if he were required to purchase and pay for a subsequent shipment. In view of Rule 7, and the language of the contract, it seems obvious that appellant is not required to return to appellee any money paid by appellee to appellant. This question, however, is one which must be submitted to arbitration under the provisions of the agreement.

Finally, and again in the category of new matter, is appellee's apparent contention that the District Court cannot stay proceedings in this action by virtue of the provisions of the law of California. That this position is wholly untenable is shown by *Pacific Indemnity Co. v. Insurance Co. of North America*, 25 Fed. (2d) 930, cited in appellant's brief. There the application for a stay of proceedings was made in the federal court, and granted upon the basis of the California law.

Appellee attempts to treat the granting of a stay of proceedings as specific enforcement of the agreement to arbitrate. The two are entirely different as

is clearly held in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* both in the Circuit Court of Appeals, reported in 70 Fed. (2d) 297 and in the Supreme Court reported in 293 U.S. 449, 79 L. Ed. 583. In fact, the case cited to sustain appellee's position, *California Prune & Apricot Growers Ass'n v. Catz American Co.,* 60 Fed. (2d) 788, is specifically distinguished upon this very ground in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* supra, in the Circuit Court of Appeals.

In the case at bar the contract between appellant and appellee provides that it is governed by the laws of California. (Tr. p. 22.) The motion of appellant in the District Court therefore referred to the California law respecting a stay of proceeding in such cases. The question before the court, however, included, among various other considerations, the power of the court to grant the stay. The existence of this power under the United States Arbitration Act was raised by appellee itself in argument upon the motion. The District Court, in its decision and in its opinion does not refer to its power to grant the stay nor to the source of this power. It is therefore necessary for appellant to discuss in its brief the sources of the court's power which are plainly both the United States Arbitration Act and the provisions of the Code of Civil Procedure of the State of California.

It is therefore respectfully submitted that for the reasons set forth in appellant's brief and in this reply

brief the order of the District Court should be reversed with directions to the District Court to grant a stay of proceedings in this action until arbitration can be had.

Dated, San Francisco,
September 10, 1943.

MANSON, ALLAN & MILLER,
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No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

General Insurance Company of America, a Corporation,

Appellant,

vs.

Pathfinder Petroleum Company, a Corporation,

Appellee,

and

Pathfinder Petroleum Company, a Corporation,

Appellant,

vs.

General Insurance Company of America, a Corporation,

Appellee.

Opening Brief of Appellant, General Insurance Company of America, a Corporation.

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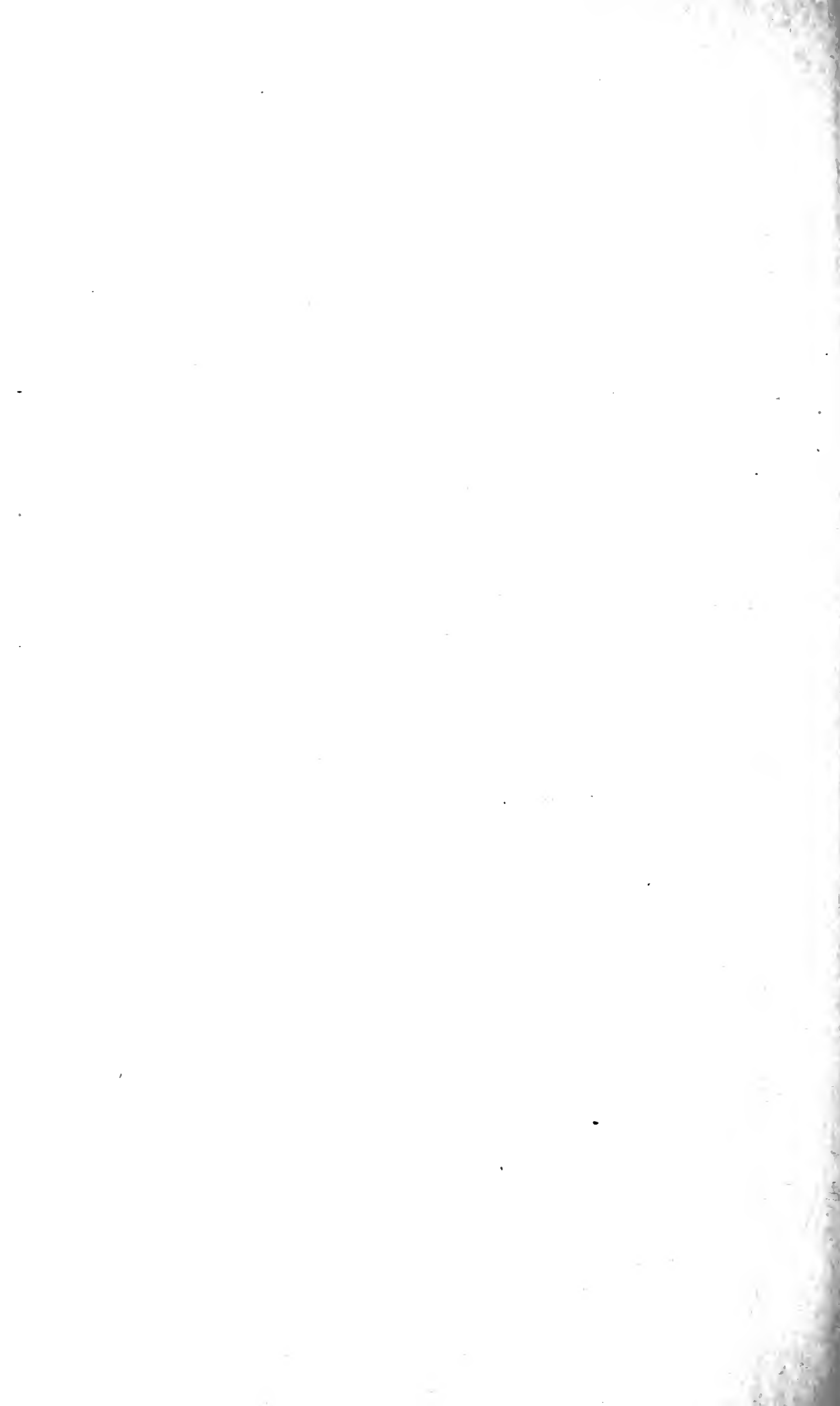

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General Insurance Company of America, a Corporation,

Appellee.

Opening Brief of Appellant, General Insurance Company of America, a Corporation.

Unless otherwise noted all references herein are to pages of the printed transcript of record. The Appendix referred to is the Appendix to this brief.

I.

Statement of Pleadings and Record.

This case originated with the filing of the complaint in the Superior Court of the State of California, in and for the County of Los Angeles.

The complaint alleged [Tr. pp. 2-7] that the plaintiff was a California corporation; that the defendant was a Washington corporation; that the plaintiff was engaged in the manufacturing, production, refining and sale of oil and petroleum products and operated a certain plant for said purposes; that the defendant had issued its certain policy of insurance; that a photostatic copy of the policy was attached to the complaint; that on said 31st day of August, 1940, while the policy was in effect, plaintiff's said plant was damaged by fire as the result of which the plaintiff was deprived of the use and occupancy thereof and its business suspended for a period of ninety-one days; that the plaintiff thereupon gave notice to the defendant of said loss and attempted to make use of other property to reduce the amount thereof; that the plaintiff on or about the 11th day of December, 1940, furnished defendant a verified preliminary proof of loss setting forth the claim of the plaintiff; that on December 20, 1940, the plaintiff on demand for additional information by the defendant furnished the defendant a verified proof of loss setting forth various matters alleged in said complaint, which proof of loss showed a loss to the plaintiff in the amount of $37,672.21; that the defendant failed, refused and neglected to notify the plaintiff in writing of its partial or total disagreement for the amount of loss

claimed by plaintiff or the amount of loss, if any the defendant admitted, on each of the articles or properties set forth in said proofs of loss; that as the result of said fire the plaintiff suffered a loss in the sum of $37,-672.21; that demand was made upon the defendant for the payment thereof but defendant has refused to pay said sum or any portion thereof.

The policy attached to the complaint [Tr. pp. 7-37] is a California Standard Form Fire Insurance Policy to which was attached an endorsement entitled: "Use and Occupancy Form No. 8—Average Clause—Specified Time." It provided that if the buildings and/or structures situated on the property occupied by plaintiff and/or machinery and/or equipment contained therein and/or on said premises be destroyed by fire during the term of the policy so as to necessitate a total or partial suspension of business the company "shall be liable under this policy for the ACTUAL LOSS SUSTAINED, by reason of such suspension, consisting of: Item I. The net profits on the business which is thereby prevented . . ."

On motion of the defendant said cause was removed to the District Court of the United States, Southern District of California, Central Division, upon the ground that a diversity of citizenship existed between the plaintiff and the defendant.

The defendant filed its answer [Tr. pp. 46-50] which in so far as it is material upon this appeal by defendant (as distinguished from the cross-appeal) alleged that its said policy of insurance provided that it should be liable only for the actual loss sustained by reason of suspension of business caused by fire and consisting of the net profits on the

business which was thereby prevented, but only to the extent they would have been earned had no fire occurred; denied that the proof of loss showed loss or damage to the plaintiff by reason of loss of profits in the sum of $37,672.21, or any other sum; denied that the defendant failed to notify the plaintiff in writing of its partial or total disagreement of the amount of loss claimed by the plaintiff, or failed to notify the plaintiff of the amount of loss, if any, which it admitted on each of the different articles or properties set forth in the proofs of loss; denied that by reason of the fire the plaintiff suffered a loss of profits in the sum of $37,672.21, or any other sum, by virtue of its inability to use or occupy the said property, or any property, or at all. The answer also alleged that the complaint did not state facts sufficient to constitute a cause of action against the defendant and did not state a claim upon which relief could be granted to plaintiff.

A pre-trial hearing was held in the District Court [Tr. pp. 172-192].

A trial before the court, without a jury, was had at the conclusion of which the court took the matter under submission and thereafter made its written findings of fact and conclusions of law. The court found amongst other things that as a result of the fire the loss to the plaintiff of profits which would have been earned amounted to $22,974.94, and that the loss to the plaintiff of fixed charges and expenses which would have been earned amounted to $7,348.63, making a total loss of $30,323.57 [Tr. p. 145].

The finding of the court with reference to fixed charges and expenses is not involved in the appeal of the defendant as distinguished from the cross-appeal.

Judgment was thereupon rendered in favor of the plaintiff in the sum of $30,323.57 with interest thereon at 7% per annum from March 11, 1941, together with costs in the amount of $133.62 [Tr. pp. 146-147].

The defendant filed its motion for a new trial, motion to amend findings of fact and conclusions of law and direct the entry of a new judgment, and motion to make findings more definite and certain [Tr. pp. 148-151]. Said motions having come on for hearing were denied [Tr. pp. 152 dd-154]. The judgment in favor of the plaintiff in the trial court has become final.

Within the time allowed by law this defendant filed its notice of appeal [Tr. p. 155].

II.

Jurisdiction.

The jurisdiction of the District Court was based upon diversity of citizenship (28 *U. S. C. A.*, Sec. 41) and the Circuit Court of Appeals has jurisdiction to review the judgment rendered by said District Court. (28 *U. S. C. A.*, Sec. 225.)

III.

Statement of the Case.

Plaintiff was engaged in the business of manufacturing and selling gasoline [Tr. pp. 13, 195]. It was able to sell more gasoline than it manufactured [Tr. p. 223]. Consequently and as a part of its general operations it also purchased and resold gasoline [Tr. p. 214]. It started manufacturing gasoline in the first week in November, 1939, but January, 1940, was its first full month of normal operations [Tr. p. 207].

Neither its income nor its profits or loss were apportioned between the gasoline it manufactured and sold and the gasoline it purchased and sold [Tr. p. 231]. It sold four different brands of gasoline but there is no way of telling how much of its manufactured gasoline or of its purchased gasoline went into each brand [Tr. pp. 221, 229-230], nor was any segregation made of the proportionate cost of the manufacture of gasoline going into each brand, nor of the cost of sales attributable to each [Tr. p. 230].

On January 14, 1940, the defendant issued its policy. This policy is what is known as a "Use and Occupancy"

policy (usually called "U. and O." policy). In fact it was a California Standard Form of Fire Insurance to which an U. and O. endorsement was attached [Tr. pp. 7-37]. The endorsement provided that if the plaintiff's plant was destroyed by fire so as to necessitate a total or partial suspension of business, the defendant would be liable for the ACTUAL LOSS SUSTAINED by reason of such suspension consisting of: "Item I. The net profits on the business which is thereby prevented . . ." [Tr. p. 13]; that the length of time suspension for which loss might be claimed should not exceed 90 days (which we will hereinafter call the suspension period) [Tr. p. 15]; that the company should be liable for no greater proportion of the loss than the amount of $40,000,000 bears to 25% of the total of net profits which would normally have been earned during the period of twelve months immediately following the fire [Tr. p. 15]; that the company should not be liable as to loss of profits for more than the net profits prevented by the suspension of business [Tr. pp. 15-16]; and that in determining the amount of net profits which would have been earned had no fire occurred consideration should be given to the experience of the business before the fire and the probable experience thereafter [Tr. p. 16].

The defendant's policy was not a fire insurance policy covering damage caused by the fire. Plaintiff had such a policy in another company, which paid the fire loss [Tr. p. 215]. *It did not cover any loss sustained by plaintiff as the result of the fire except in so far as such loss consisted of net profit and certain fixed charges and expenses which plaintiff would have earned had it not been for the fire.*

Prior to the fire the plaintiff had contracted for the construction of a polymerization unit, the operation of which would increase plaintiff's revenue. Actual work on the plant had not commenced at the date of the fire [Tr. pp. 322-324] but the plant was to have been erected by October 5, 1940. Owing to the fire the plant was not put in operation during the suspension period as the result of which, plaintiff's witnesses testified, that plaintiff suffered a loss of $3,901.15. On this appeal we are not attacking the amount of this particular claimed loss but are contending that it was not recoverable by the plaintiff at all.

Following the fire the plaintiff had on hand an average of about five or six days' supply of gasoline, of which perhaps one-third might necessarily be minimum working stocks down to the suction lines right in the tanks [Tr. p. 197].

Following the fire the adjuster for the defendant told plaintiff's president to proceed to do everything that was necessary to minimize the loss and get the plant rehabilitated as soon as possible [Tr. pp. 196, 210]. Plaintiff, continued its operations during this suspension period, namely, September, October and November, 1940. It however, manufactured no gasoline during the period, but, in order to fulfill its commitments, it continued to purchase and resell gasoline [Tr. pp. 210-211].

Mr. Devere, president of plaintiff corporation, testified as to the profits made from January to August, inclusive [Tr. p. 233. See also Plf's. Exh. 1, Tr. p. 68]. These figures, however, did not take any depreciation into consideration [Plf's. Exh. 1, Tr. p. 68].

For the convenience of the court, profits or losses for each of the months of the year during which plaintiff manufactured gasoline, with and without taking depreciation into consideration, are shown in Appendix 1.

The total profits for these eight months (still not taking depreciation into consideration) were then divided by eight to give the average monthly profits for those eight months and this average was multiplied by three to represent for three months' suspension period. The amount thus arrived at was increased by 10% to represent an anticipated increase in business. The total, namely, $19,073.79 was plaintiff's estimated loss of profits due to the fire, exclusive of the $3,901.15 loss of profits due to inability to operate the polymerization unit [Tr. pp. 205-206, 238]. The sum of these two amounts, namely, $22,974.94, is the amount awarded plaintiff by the trial court as profits which it would have earned had it not been for the fire [Tr. p. 145].

For the convenience of the court we have attached to this brief as an appendix, tables showing plaintiff's operations for every month during the year 1940 as follows (the prices being given both in decimal points of $1.00 for convenience in checking against the transcript and in cents for ease of understanding in our discussion):

Appendix 2:

(1) Gasoline manufactured.

(2) Cost per gallon of manufacture of gasoline.

Appendix 3:

(1) Gasoline purchased.

(2) Cost per gallon of gasoline purchased.

Appendix 4:

(1) Gasoline sold.

(2) Price received per gallon of gasoline sold.

Mr. Devere on direct examination and again on cross-examination testified that the general market conditions were the same during the suspension period as they were during the early part of the year 1940 [Tr. pp. 213-214, 215-216]. The actual figures furnished by plaintiff itself contradict this statement. Thus the average price obtained by plaintiff for gasoline sold by it steadily increased from 6.485¢ in January to a peak of 7.203¢ for May [Tr. pp. 259-261]. Then came the gasoline war and consequent break in price so that the price of gasoline steadily dropped during June, July and August until for the latter month the average price was only 5.973¢. In September the price rose slightly to 6.177¢ dropping again in October to 6.146¢ and again dropping in November so as to reach the low for the entire year, namely, 5.928¢ [Tr. pp. 260-261]. These figures are tabulated in Appendix 4. Likewise the price paid by plaintiff for the gasoline it purchased followed the same general trend, although its peak was reached in March rather than May. June was the lowest of the first eight months and September, October and November were each lower than any preceding month, with the lowest price being also reached in November [Tr. pp. 81-84, 134-135, 141-142]. These figures are tabulated in Appendix 3.

Mr. Devere also testified on direct examination that as sales increased, profits also increased [Tr. p. 206]. On redirect examination he testified that the reasons for the fluctuations in profits were that plaintiff was endeavor-

ing, amongst other things, to increase the capacity of the plant; that in June plaintiff did some technical work on the furnace and was experimenting some difficulty causing intermittent operation during that period [Tr. pp. 233-234]. He also testified on redirect that August was not a typical month [Tr. p. 234]. Again the figures presented by plaintiff are in conflict with these statements. Plaintiff's figures show that its sales increased steadily from January to April, inclusive, whereas its profits increased only from January to March and dropped off in April. Its sales decreased in May to below the March level, yet May showed a very substantial increase in profits over any prior month. In June its sales were much greater than in any previous month (increasing more than 50% over those of January), yet its profits for June were less even than its profits for January and were only about 27% of its May profits. Its July sales decreased below June yet profits increased nearly 40%. In August sales were considerably higher than in any previous month, yet plaintiff's profits (even excluding depreciation) only amount to $456.96. August sales were approximately 123% of May sales, while August profit was only 4% of that of May [Plf's. Exh. 1, Tr. p. 68]. These figures are tabulated in Appendices 1 and 4.

In the above we have taken plaintiff's own figures without taking depreciation into consideration. While depreciation would reduce or eliminate the claimed profit, it would not affect the trend of profits or losses.

Profits *did not* increase as sales increased as stated by Mr. Devere, but *did* vary as did the prices obtained by plaintiff for the gasoline it sold. Likewise market con-

ditions *did vary* greatly throughout the year, advancing until May, dropping until August, rising slightly in September and again dropping to a new low through November, and then rising in December.

A comparison of the average prices per gallon received by plaintiff shows the following:

For the first five months of the year 6.787¢; for June, July and August 6.203¢; for September, October and November (suspension period) 6.084¢. (See Appendix 4.)

We would call the attention of the court to Defendant's Exhibits B, C and D which show in graphic form the variation in prices received, and how profits (with and without depreciation) varied almost exactly as did these prices.

Exhibit B [Tr. pp. 125, 343] shows the prices received by plaintiff for gasoline for each of the months of the year 1940. It will be observed that the peak was reached in May and the low point in November, with a secondary low point in August, the latter, however, being slightly higher than the low point for November. It will also be observed that the average prices for the suspension period, September, October and November, are lower than for the immediately preceding three months of June, July and August, and of course greatly lower than the average price for the first five months of the year.

In Exhibit B [Tr. pp. 126, 346] the upper line shows the actual profits made by plaintiff during each of the months January to August, inclusive, if depreciation is not taken into consideration.

The lower line shows the actual profits made by plaintiff from January to July, inclusive, and the loss sustained in August, if depreciation, as shown by plaintiff's books, is taken into consideration.

Exhibit D [Tr. pp. 127, 347] is a combination of Exhibits B and C and shows how plaintiff's profits or losses varied almost exactly as did the prices received by plaintiff for its gasoline. Thus, the thin black line in Exhibit D is the same line as the line on Exhibit B, and the red lines on Exhibit D are the same as the red lines on Exhibit C.

Mr. Devere also testified that during the three months' suspension period, plaintiff averaged about 20% more in sales volume than for the months of June, July and August, and that in November it probably averaged more than 20% greater than in August [Tr. pp. 211, 219-220]. In fact the average increase for the suspension period over the preceding three months of June, July and August was approximately 14%; and the increase for November over August was slightly less than 14%. He testified that the increase in December over August was about thirty to thirty-five per cent [Tr. p. 220], whereas in fact it was almost exactly 19%. The figures upon which these actual percentages are calculated are set forth in Appendix 4.

So far in discussing the figures for plaintiff's profits we have not included any allowance for depreciation [Ptf's. Exh. 1, Tr. p. 68]. Devere testified on direct examination that plaintiff used the item of $3,034.99 as depreciation because "we felt that that represented the

true depreciation for the first eight months. There was considerable depreciation of material values, and we felt that that properly and correctly reflected the actual depreciation in the plant during that period" [Tr. pp. 208-209]. However, in fact, even this figure of $3,034.99 does not appear anywhere in plaintiff's computation of profits [Ptf's. Exh. No. 1, Tr. p. 68].

Devere testified that the plaintiff's books and records reflected a different depreciation, namely, depreciation allowable under the income tax laws [Tr. pp. 208-209]. On cross-examination he testified that the higher figure shown on plaintiff's books, namely, $23,079.59, was 10% per barrel of oil processed through the plant and was arrived at by taking the total plant value, appraising the useful life of the individual unit parts of the plant and working out a composite annual figure in dollars and cents. He testified that taking into consideration the depreciation as shown by plaintiff's books, plaintiff operated at a loss for the month of August [Tr. pp. 218-219].

Plaintiff's auditor, Young, testified as to the amount of depreciation for each month as shown by plaintiff's books [Tr. pp. 273-274]. He testified this depreciation, figured on the estimated life of the various component parts of the plant, gave a depreciation that was very close to the figures shown upon plaintiff's books and used in their Federal and State Income Tax Returns [Tr. pp. 299-303]. The effect of this depreciation so testified to and appearing on plaintiff's books is shown in Appendix 1.

An inspection of these profits or losses shows (Appendix No. 1) an increasing profit from January to May with a very sharp drop off for June, July and August.

In fact, if depreciation is to be considered, August shows a substantial loss. This is expressly admitted by plaintiff [Tr. pp. 219, 274]. It will further be noted that this substantial drop in plaintiff's profits coincided with the break of market conditions above referred to. This is clearly visualized in Defendant's Exhibits B, C and D [Tr. pp. 125-127].

If we are to assume that during the suspension period plaintiff would have made the same average monthly profit as it had averaged over the *entire* eight months preceding the fire, plaintiff would have made a profit during the suspension period, and this profit would have been approximately as found by the court, provided depreciation is not to be taken into consideration. It would have been much lower than that found by the court if depreciation is to be considered.

On the other hand if we are to assume that during the suspension period plaintiff would have made the same average monthly profit as it had averaged *after* the break in the market, that is, during the three months immediately preceding the fire, or as it made during the month immediately preceding and the month immediately following the suspension period, during all of which periods market conditions were much more similar to those existing during the suspension period than were market conditions during the first five months of the year, then, without considering depreciation, plaintiff would have made a very small profit during the suspension period, or if depreciation is considered, it would have sustained a substantial monthly loss during that suspension period.

If, however, the true criterion is whether the plaintiff would have made a profit had it not during the suspension period incurred the extra cost of purchasing instead of manufacturing gasoline, the evidence discloses the following situation:

During the first eight months of the year plaintiff purchased and manufactured 6,640,260 gallons of gasoline at a total cost of $320,892.06. This gives an average cost per gallon of 4.833¢.

During the three months following the break in the market and immediately preceding the fire plaintiff purchased and manufactured 2,762,954 gallons at a total cost of $135,716.30. This gives an average cost per gallon of 4.912¢.

During August and December, the months immediately preceding and following the fire, plaintiff purchased and manufactured 2,231,765 gallons at a total cost of $108,553.05. This gives an everage cost per gallon of 4.864¢.

During the suspension period plaintiff manufactured no gasoline but purchased 3,104,715 gallons at a total cost of $174,329.74. This gives an average cost per gallon of 5.615¢.

The extra cost to plaintiff of the acquisition of these 3,104,715 gallons of gasoline during the suspension period over what this amount of gasoline would have cost in each of these periods would therefore be, respectively, $24,278.87, $21,876.14 and $23,316.41.

All of the above figures are mathematical computations from those shown on Appedices 2, 3 and 4, which in turn refer to the Transcript of the Record.

During the suspension period plaintiff actually operated at a loss of $32,975.68 [Plf. Exh. 1, Tr. pp. 67, 251-252]. Yet from the above figures its maximum extra cost of gasoline for the suspension period was only $24,278.87.

Consequently, even had it not incurred this extra cost, plaintiff would have sustained a loss during the suspension period of from $8,696.81 to $11,099.54. Even if we deduct from this loss the entire amount which plaintiff claims it would have saved by reason of the polymerization unit, plaintiff would still have suffered a loss for the suspension period of from $4,795.66 to $7,198.39.

Very similar results are obtained by taking plaintiff's own statement of the excess cost to it of having to purchase rather than manufacture gasoline during the suspension period.

During this period it purchased 3,104,715 gallons of gasoline. Plaintiff itself filed an exhibit showing that the excess cost of the purchase of all of this gasoline over what it would have cost plaintiff to have manufactured all thereof was the sum of $30,995.94 [Plf. Exh. 7, Tr. pp. 124, 313, Appendix 5].

In any event and had there been no fire, plaintiff would have purchased a certain amount of this gasoline. The amount it would have so purchased is variously estimated from 14%, according to plaintiff's estimate upon the trial, to 33% based on its December operations.

Taking the 14% estimate, the extra cost to plaintiff of having to purchase rather than manufacture gasoline amounts to $26,656.51. Had it made this saving through manufacturing rather than purchasing this gasoline, plaintiff would still have operated at a loss for the suspension period of $32,975.68 minus $26,656.51, that is at a loss of $6,319.17. Even if this loss is reduced by the entire amount which plaintiff claims it would have saved by the use of the polymerization unit, plaintiff would still have sustained a loss for the suspension period of $2,418.02.

If the 33% estimate is taken, plaintiff's loss for that suspension period would have been $8,307.26.

IV.

Specification of Errors.

I.

That the findings of fact do not support the conclusions of law or judgment in that there is no finding:

(a) That the plaintiff sustained any actual loss by reason of the suspension of its business caused by said fire and consisting of net or any profits on its business thereby prevented.

(b) That the plaintiff sustained an actual loss by reason of the suspension of its business caused by said fire consisting of net or any profits in the sum of $22,974.94, or in any other sum on its business thereby prevented.

(c) That the sum of $22,974.94, or any other sum, was not a greater proportion of the loss sustained by the plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned during the period of twelve months immediately following said fire.

(d) That plaintiff would have earned net or any profits in the sum of $22,974.94, or in any other sum, within the suspension period provided in said policy; that is, within the three months after the date of said fire; and

(e) In that there is no finding as to the period of time over which the court found a loss to the plaintiff of profits which would have been earned amounted to $22,974.94.

II.

That the judgment in this case is contrary to law in that:

(1) Said judgment includes an award to plaintiff in the sum of $22,974.94 under Item I of defendant's policy

for the loss to plaintiff of profits which it would have earned during the three months immediately following the 31st day of August, 1940, being the date of the fire involved in this case, whereas, in fact, even had there been no such fire, the plaintiff would not have made profits in said or any sum during said period from its manufacturing business or at all.

(2) That included in said award to plaintiff of said sum of $22,974.94, is the sum of $3,901.15 for loss of profits from a polymerization unit, whereas said item is not under the law recoverable by plaintiff in this action.

(3) That said award to plaintiff was made despite the absence of any evidence that the amount awarded to plaintiff was not a greater proportion of the loss sustained by plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned by plaintiff during the period of twelve months immediately following said fire.

(4) That the complaint did not state facts sufficient to constitute a cause of action against the defendant, nor a claim upon which relief might be granted to the plaintiff.

(5) Said judgment is contrary to the applicable laws of the State of California and of the United States of America.

III.

That the evidence is insufficient to sustain the findings of fact of the trial court (Finding No. IX) that as a result of the fire of August 31, 1940, the loss to the plaintiff of profits which would have been earned amounted to $22,974.94 in that:

(1) The evidence is insufficient to support said finding.

(2) The evidence affirmatively establishes that the fire involved in this case occurred on the 31st day of August, 1940; that it was a condition of the defendant's policy of insurance that if the buildings and/or structures of the plaintiff and/or machinery and/or equipment contained therein be destroyed or damaged by fire so as to necessitate a total or partial suspension of plaintiff's business, the defendant should be liable under its policy for the actual losses sustained by reason of such suspension consisting of Item I: "The net profits on the business which is thereby prevented."

That it was a further condition of said policy that the length of time of suspension for which plaintiff could recover under said policy should not exceed three months immediately following said fire, and that said policy did not provide for any other recovery by the plaintiff against the defendant except for certain items of fixed charges and expenses which are not involved in this appeal by the defendant from said judgment.

That the evidence further affirmatively establishes that during the said three months immediately following the date of said fire, to wit, the 31st day of August, 1940, even had no fire occurred, the plaintiff:

(a) Would not have earned net or any profits in said sum of $22,974.94, or in any other sum;

(b) Would not have earned net or any profits from the business prevented by said fire in said sum, or in any other sum;

(c) Would not have made profits from the business prevented by the fire, or otherwise, in said sum or in any other sum;

(d) Would have operated its business at a loss to plaintiff.

(3) That the evidence is insufficient to sustain the award to the plaintiff of the sum of $3,901.15, being a part of said sum of $22,974.94, on account of loss of profits from said polymerization unit in that the evidence affirmatively shows that the plaintiff was not entitled to recover the said item in this case.

(a)

III.

That the finding of fact No. IX is contrary to the evidence for the reasons and each of them set forth in Subdivision III above.

IV.

That the judgment in this case is excessive:

(1) In that it contains an award to the plaintiff of $22,974.94 for loss of profits which the plaintiff would have earned during the three months immediately following said fire, whereas, the evidence fails to support said finding, or any finding that the plaintiff would have earned or made said profit of $22,974.94, or any similar profit, or any profit during said three months immediately following the fire, but on the contrary establishes that the plaintiff would not have earned any profit during said three months even had there been no fire.

(2) In that the evidence fails to show that said amount awarded plaintiff or any other sum would not have been a greater proportion of the loss sustained by plaintiff than the amount insured by the defendant's policy bears to 25% of the total net profits which would normally have been earned by plaintiff during the period of twelve months immediately following said fire.

(3) In that it contains an award for the plaintiff in the sum of $3,901.15 on account of loss of profits from said polymerization unit, whereas, plaintiff is not entitled in this action to recover any sum for any such loss.

ARGUMENT.

V.

The Policy Only Covers Loss of Profits Which Would Have Been Earned.

As will be observed from the foregoing statement of the case, in order to entitle the plaintiff to recover under Item I of the policy, which alone is involved in the defendant's appeal, the following conditions must have been met:

(1) A fire.

(2) Destruction of or damage to plaintiff's buildings, machinery or equipment.

(3) Suspension, total or partial, of plaintiff's business caused thereby.

(4) Actual loss sustained by plaintiff thereby, provided such actual loss consisted of: Net profits

(a) which would have been earned during the suspension period;

(b) which would have come from the business prevented by the destruction or damage caused by the fire.

(5) The loss claimed by plaintiff must not exceed a greater proportion of plaintiff's total loss than the amount insured by the defendant's policy bears to 25% of the total net profits (Item I) and charges and expenses (as provided in Item II) which would normally have been earned during the twelve months immediately following the fire.

The above provisions of the policy are found on pages 13 to 16 of the printed transcript.

The case was tried upon the theory that plaintiff's recovery, if any, was limited to profits and certain fixed charges and expenses which it would have earned had there been no fire. This was stipulated to on the pre-trial hearing [Tr. pp. 190-191], which proceedings were expressly incorporated in the trial of the case [Tr. p. 329]. The findings made by the court were expressly that the plaintiff would have earned a profit and would have earned the fixed charges and expenses [Finding IX, Tr. p. 145]. The trial court on motion for new trial twice expressly stated that plaintiff had to make a profit in order to recover anything [Tr. pp. 152v, 152dd].

The authorities are clear to the same effect:

> *Grand Pacific Hotel Co. v. Insurance Co.,* 243 Ill. 110; 90 N. E. 244;
>
> *Fidelity-Phenix Fire Insurance Company v. Benedict Coal Corporation* (C. C. A. 4), 64 Fed (2d) 347.

Nevertheless we cannot help feeling that the court, while paying lip service to the policy provisions, in fact "re-wrote" the policy to conform to its ideas as to what it should have contained and so as to give plaintiff a coverage which it had not bought and for which it had not paid. Thus, at the termination of plaintiff's case in chief, the court asked us what was our position [Tr. p. 328]. We replied in strict accordance with the provisions of the policy, the law and the stipulation of plaintiff's counsel [Tr. p. 328]. The court thereupon said [Tr. p. 329]:

> "I am surely going to give you something to appeal on when we get through with this case; I will

> tell you this right now, gentlemen; so you might as well prepare to protect your records. . . . And I am going to give you the chance to build up a good record for appeal to the Circuit Court and let them iron out the law on this because I am not going to let you issue this kind of a policy and let you crawl out on any theory like that. I am telling you that right now so you can prepare an appeal and let the Circuit Court of Appeals thresh it out."

Again at the close of the case the court said [Tr. p. 385]:

> "I am going to read your briefs and your authorities, and am going to try to arrive at a figure in this case that I think is fair and equitable. Then if either side is dissatisfied with it let the Circuit Court take the record and see if they can figure out something that is different."

In view of the attitude of the trial court it may be well to point out that the object of a use and occupancy policy is *not* to insure the ability of the insured to continue in business. It merely insures against loss of profits (and certain fixed charges and expenses) for a certain time. In *Grand Pacific Hotel Co. v. Insurance Co., supra,* 243 Ill. 110; 90 N. E. 244, a fire destroyed a certain hotel which the insured held under lease. The destruction of the hotel gave the owner an opportunity to cancel the lease. The insured claimed to be entitled to recover for its loss of profits for the entire unexpired term of the lease. The Court held against this contention saying p. 113:

> "The termination of appellee's lease ended the receipt of profits from the hotel business for the time

being, and appellee insured against the cessation of profits by fire, but only for a limited period specified in the policy. The fire merely furnished the condition which enabled the lessor to terminate the lease in accordance with its terms, but whether the fire was the cause of the termination of the lease or not is immaterial. The policy was free from ambiguity and the words used had a precise, definite and well understood meaning. No language could more clearly express the intention of the parties as to the time for which the loss should be computed. The policy did not insure appellant in the possession of the premises against forfeiture of the lease and appellee did not agree to keep appellant in the use and occupancy of the premises, but only agreed to pay its *pro rata* share of the loss for a period computed from the day of the fire to the time when the building and equipment therein could with ordinary diligence and dispatch be rebuilt, repaired or replaced. To say that the language used meant anything different would be to make a new contract, and the construction given to the policy by the superior court was correct."

The theory of the case is obviously correct. The only loss which necessarily follows from a fire (other than the destruction of the property itself which in the present case was covered by a policy in a different company) [Tr. p. 215] is the loss of profits derived from that property, if any such would have been made, and of necessarily continuing fixed charges and expenses, likewise if they would have been earned. Any other loss is purely voluntary on the part of the insured being probably incurred only with a view to future business, which future business is not insured under the policy.

Assume a manufacturer could not have manufactured its product except at a loss during a suspension period caused by a fire, obviously a complete suspension of its manufacturing business during that suspension period would result in a saving of that loss. If, however, the assured for reasons of its own decides that it is better to continue in business and incur an even greater loss consequent upon purchasing the article to replace what it would have manufactured, this is a purely voluntary act on its part, for which it cannot obtain a recovery from one who has only insured it against *loss of profits* that would have been earned during the period of time necessary to rehabilitate its plant.

To make the present policy cover an actual loss sustained probably for the purpose of aiding plaintiff's business after its resumption, which is what we believe the court in fact did do, amounts, in the words of the court quoted above, to the writing of a new contract between the parties into which they themselves did not see fit to enter.

VI.

The Complaint Fails to State a Cause of Action Against Defendant or a Claim Upon Which Relief May Be Granted to Plaintiff.

In the last subdivison of this brief we have set forth the elements necessary to entitle plaintiff to a recovery.

The complaint alleges in paragraph X [Tr. p. 6]:

> "That as the result of the fire of August 30, 1940 this defendant (obviously a misprint for plaintiff) suffered a loss in the amount of Thirty-seven Thousand Six Hundred Seventy Two and 21/100 Dollars ($37,672.21) by virtue of its inability to use and occupy the property described in Exhibit A."

This is not an allegation that the plaintiff suffered a *loss of profits* in said or any sum by reason of the fire, nor is it an allegation that the plaintiff sustained any loss by reason of fixed charges and expenses which it would have earned had it not been for the fire (the only other item covered by the policy). If, were it not for the fire, the plaintiff would not have earned enough to make up this loss of $37,672.21, then it is obvious that, even had there been no fire, plaintiff would have made no profits and would not have earned its fixed charges and expenses and, therefore, would not be entitled to any recovery under the policy.

The complaint nowhere alleges that the alleged loss of $37,672.21 was sustained during the suspension period, yet the policy clearly covers only loss of profits and of fixed charges and expenses sustained during that suspension period, namely, ninety days [Tr. pp. 14-15]. Again the complaint nowhere alleges what would normally have been earned by plaintiff during the period of twelve months immediately following the fire, nor that the amount claimed by plaintiff was no greater proportion of

its loss than the amount insured by said policy bears to 25% of the net profits and charges and expenses which normally would have been earned by plaintiff during the period of twelve months immediately following the fire.

Each of these allegations was a necessary allegation in plaintiff's complaint. Thus it is said in *Allen v. Home Insurance Company,* 133 Cal. 29, 30; 65 Pac. 138, 138:

> "It is first claimed that the court erred in overruling the demurrer to the amended complaint. The principal contention under this head is, that the complaint does not allege that the building, at the time of the fire, was occupied as a dwelling house. It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling-house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling-house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. (*Green v. Palmer,* 15 Cal. 413; *Spring Valley Water Works v. San Francisco,* 82 Cal. 323.)
>
> "In declaring upon a contract of insurance, so much of it as will show a right to recover must be set out, in terms or in substance. (2 *May on Insurance,* 4th ed., sec. 589.)
>
> "Accordingly, it has been held that where the policy was upon the stock of a commission merchant, while in a certain warehouse, the complaint must allege that the stock was in such warehouse at the time of the fire. (*Todd v. Germania Fire Ins. Co.,* 1 Mo. App. 472.)
>
> "Where a policy of insurance confined the insurance to the building while located and occupied by the plaintiff in the town of Newfane, it was held

that the case should be reversed because the condition was not alleged in the complaint. (*Powers v. New England Fire Ins. Co.*, 68 Vt. 390.)

"The allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover. Certain conditions subsequent to the right of recovery, matters of defense, the non-performance of conditions subsequent, and certain negative prohibited acts need not be pleaded by plaintiff; but the rule does not extend to the essence of the cause of action. The facts alleged in this complaint may all be true, and yet the plaintiff not be entitled to recover. She could not recover unless she proves more than the complaint alleges. It was therefore error to overrule the demurrer."

See also:

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337, 346; 89 Pac. (2d) 732, 738.

In the present case in order to bring itself within the policy provisions plaintiff had to establish that by reason of the fire it sustained a *loss of net profits* which it would have earned during the suspension period from the business prevented by the destruction or damage caused by the fire. All it alleged in its complaint was that it had sustained a loss by reason of the fire. Certainly, as said in the cited case, it may be true that because of the fire plaintiff sustained a loss and yet plaintiff be not entitled to recover if that loss was not a loss of net profits which would have been derived from the business whose suspension was caused by the damage occasioned by the fire.

The defendant in the case at bar specifically pleaded that the complaint did not state a cause of action or a claim upon which relief could be granted to the plaintiff. The defense was good and should have been sustained.

VII.

The Findings of Fact Do Not Support the Judgment.

Among the conditions prerequisite to a recovery by the plaintiff are:

(a) The plaintiff must have sustained an actual loss consisting of net profits which it would have earned on the business prevented by the fire. While the court does find [Finding No. IX, Tr. p. 145] that as a result of the fire the loss to the plaintiff of profits which it would have earned amounted to the sum of $22,974.94, there is no finding that the business prevented by the fire would have earned those profits. Such finding is necessary to support a judgment for that loss since, if a loss of profits was occasioned to the plaintiff by the fire but for some reason other than the prevention of plaintiff's business due to that fire, it would not be recoverable under the policy.

(b) Again while said finding No. IX is to the effect that plaintiff sustained a loss in said sum, there is no finding that this loss represents profits which would have been earned during the suspension period. Again under the provisions of the policy such a finding is essential before recovery can be had for any such loss.

(c) There is no finding as to the net profits which plaintiff would normally have made during the twelve months immediately succeeding the fire, nor that the amount of the loss claimed by the plaintiff did not bear a greater proportion to its total losses than did the amount insured by the defendant's policy bear to 25% of said profits which the plaintiff would normally have earned during the twelve months immediately succeeding the fire.

The findings of fact are, therefore, insufficient to support the judgment.

VIII.

Plaintiff Did Not Support the Burden of Proof on It.

The burden of proof was upon the plaintiff to establish that it sustained a loss of profits by reason of the fire. The evidence not only failed to show this but actually established that even had there been no fire the plaintiff would have operated at a loss during the suspension period. This matter will be considered at length in our discussion of the insufficiency of the evidence to sustain the findings.

The burden of proof was also upon the plaintiff to establish that such loss of profits, if any, as it would have sustained, during the suspension period was from a business prevented by the fire. From the inception of its operations plaintiff maintained two distinct businesses. One, the manufacture and sale of gasoline, and two, the purchase and resale of gasoline. *Only the former was interrupted by the fire.* While the plaintiff introduced evidence as to its claimed profits from all its operations prior to the fire, there was no evidence as to what proportion thereof was attributable to its manufacturing business rather than to its business of purchasing and reselling gasoline. It placed four distinct brands of gasoline on the market, which sold for different prices [Tr. p. 266], but there is no evidence as to the price for which each brand sold, nor as to how much of its manufactured or purchased gasoline went into any of these four brands. Consequently there is no way of telling how much of the plaintiff's claimed profits were *not* attributable to the reselling of purchased gasoline, but resulted from the gaso-

line it manufactured. The evidence of plaintiff's experience before the fire, therefore, furnishes no indication as to the amount of profits, if any, which it would have earned during the suspension period from the manufacture of gasoline and the sale thereof.

As will be pointed out at length in our discussion of the insufficiency of the evidence to support the findings, it appears that the plaintiff conducted its operations during the suspension period at such a loss that even had it been able to manufacture instead of purchase gasoline, this loss would not have been turned into a profit.

Finally on this point there was no evidence whatsoever as to the probable experience of the plaintiff for the twelve months immediately succeeding the fire. Consequently there was no evidence as to whether or not the amount claimed by plaintiff was a greater proportion of plaintiff's entire loss than the amount insured by the defendant's policy bears to 25% of the total net profits which plaintiff would normally have earned during that twelve months' period.

The burden was upon the plaintiff to bring its claim within the policy coverage by establishing each of the above elements. Its failure so to do renders the judgment in its favor unsupported by the evidence.

In the latest California case we have found upon the subject, namely, *Ells v. Order of United etc. Travelers*

(1942), 20 Cal. (2d) 290, 304, 125 Pac. (2d) 457, 464, it is said:

> "The burden was on the respondents to establish as a part of their case that death resulted from an accident, as defined by the terms of the contract of insurance, and it was not incumbent on the appellant to prove that death was not caused by accident. (*Rock v. Travelers Ins. Co.*, 172 Cal. 462 (156 Pac. 1029)."

See also numerous other cases including:

Allen v. Home Ins. Co., 133 Cal. 29, 33, 65 Pac. 138;

Kellner v. Travelers Ins. Co., 180 Cal. 326, 330, 181 Pac. 61, 63;

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337, 346, 89 Pac. (2d) 732, 738, *supra;*

Dark v. Prudential Ins. Co., 4 Cal. App. (2d) 338, 342, 40 Pac. (2d) 906, 908.

IX.

The Evidence Does Not Support the Finding of Fact That the Plaintiff Would Have Made a Profit.

The policy provides (Provision 5) that in determining the net profits due consideration shall be given to the experience of the business before the fire and the probable experience thereafter [Tr. p. 16].

As shown in our statement of facts, several methods have been suggested to ascertain what would have been plaintiff's profit or loss during this suspension period had there been no fire.

Method A: Find the plaintiff's average profit or loss for a certain period and assume plaintiff would have operated for the suspension period with the same average result.

Method B: Take the average cost per gallon to plaintiff of all its gasoline, including both manufactured and purchased, over a period and multiply this by the number of gallons plaintiff actually purchased during this suspension period. Compare this with the actual cost of that gallonage so purchased. The difference would be the extra cost to plaintiff of purchasing all its gasoline over the cost to it of manufacturing some and purchasing the remainder of that gasoline. Ascertain if this difference would have turned plaintiff's admitted loss for the suspension period into a profit.

Method C: Ascertain the amount of gasoline which plaintiff would have manufactured during the suspension period had there been no fire, compare the cost of manufacturing such amount of gasoline with the cost of pur-

chasing the same amount; ascertain whether if plaintiff had manufactured, rather than purchased, this amount of gasoline the savings it would thereby have made would have changed its admitted loss for the suspension period into a profit. We believe this method is the most accurate of all.

Method A.

Based on Average Profit or Loss.

Three periods have been suggested which might be taken as the basis for use under this method:

(a) The eight months preceding the fire.

(b) The three months immediately preceding the fire.

(c) The month immediately preceding and the month immediately succeeding the suspension period.

Of course this method is based on the assumption that the plaintiff would have operated during the suspension period at the same average profit or loss as for the period with which it is being compared.

(a)

Taking the Eight Months Preceding the Fire as the Basis.

This is the method advocated by plaintiff and adopted by the trial court [Tr. pp. 152 q, 205, 238].

Thus the method used by plaintiff's auditor [Tr. pp. 205, 238] was to take the entire profit for the eight months preceding the fire, divide it by eight to get the average monthly profit for that period and then multiply that average by three to represent the three months' suspension period. Adding 10% to represent anticipated increase in business, and $3,901.15 on account of the

polymerization unit plaintiff's auditor reached a figure of $22,974.94 as representing the profits plaintiff would have earned during the suspension period. The trial court adopted this method [Tr. p. 152 q] and found plaintiff's loss of profits to have been in that amount. These figures, however, are without allowance for depreciation.

Depreciation must, however, be taken into consideration. It is an item of expense of doing business like any other item and may not be ignored. (*Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C. C. A. 4), 64 Fed. (2d) 347 at 353.)

Mr. Devere, plaintiff's president, testified that "we felt that" $3,034.93 would represent the depreciation during these eight months, but his testimony was so unreliable as to other figures that this "feeling" cannot be accorded any weight. Thus, as pointed out in our statement of facts, he testified that market conditions remained the same throughout the year, whereas they varied greatly; that as sales increased profits increased, whereas in many cases the exact opposite was the fact; that the fluctuation in profits was caused by plaintiff's endeavors to increase the capacity of its plant, whereas these fluctuations were primarily due to variations in the prices obtained by plaintiff for its gasoline; that plaintiff increased its business for the suspension period over the three preceding months by 20%, whereas the increase was only 14%; and that the increase in business for November was over 20% of that of August, whereas it was not quite 14%, and that the increase for December over August was from 30 to 35%, whereas it actually was

19%. Yet Mr. Devere, as president of plaintiff corporation, was called by plaintiff to establish plaintiff's losses and was asked these questions on direct examination. It cannot, therefore, be said that he was taken by surprise. The fact remains that on these vital matters to plaintiff's cause of action, Mr. Devere was either grossly ignorant or was very careless in his assertions. It would be curious if he were right as to his "feeling" about depreciation and wrong in his positive testimony about market conditions, reasons for fluctuation of profits, increase in business, etc.

However, on cross-examination he was obliged to admit that plaintiff upon its books carried depreciation at a much greater sum, in fact, at a total of $23,079.59 for these eight months; that this was the figure reported on plaintiff's income tax returns; was 10¢ per barrel of oil processed through the plant, and was arrived at by taking the total plant value, appraising the useful life of the individual unit parts of the plant and working out a composite annual figure in dollars and cents.

Mr. Young, plaintiff's auditor, did not support Mr Devere's "feeling" as to depreciation. On the other hand he testified that the books showed a depreciation of $23,079.59 for these eight months, and that this depreciation figured on the estimated life of the various component parts of the plant gave a depreciation that was very close to that shown upon plaintiff's books and used upon their Federal and State Income Tax returns and the court accepted Mr. Young's testimony [Tr. p. 152 q].

If we do take this depreciation into consideration we find that for the eight months prior to the fire, plaintiff's

profit was $26,194.95 (Appendix 1). This divided by eight and multiplied by three equals $9,823.11. Add 10% and the $3,901.15 for the polymerization unit and we have a total of $14,706.57 as representing plaintiff's anticipated profits for the suspension period.

Therefore, under plaintiff's own method of computation, taking its own figures and accepting its own auditor's computations, but also taking into consideration depreciation as shown on its own books and as figured in the ordinary way, that is on the basis of the life of the plant, we find that the evidence would support no finding of profits which the plaintiff would have made during the suspension period in excess of $14,706.57. Since depreciation must be taken into consideration, even adopting plaintiff's own method of using the entire preceding eight months as the basis, the finding made by the court that the plaintiff would have earned profits of $22,974.94 is unsupported by the evidence and the amount awarded plaintiff is excessive.

(b)

Taking the Three Months Preceding the Fire as the Basis.

The method of computation which we have just considered might afford a reasonable ground for computing the anticipated profits for the succeeding three months if there had been no marked change in market conditions during the year. HOWEVER, MARKET CONDITIONS DID CHANGE. The average price obtained by plaintiff for its gasoline for the first five months of the year was 6.787¢ per gallon. THEN CAME THE BREAK IN THE MARKET. For the next three months, June, July and August, the

average price obtained by plaintiff for its gasoline was only 6.203¢ per gallon. On the other hand the average cost of manufacture of gasoline rose from 4.605¢ per gallon for the first months to 4.613¢ for June, July and August [Appendices 2 and 4. See Def's. Exh. B, Tr. p. 125. which visualizes the situation.]

We would, therefore, expect to find a sharp drop in the profits made by plaintiff for these months of June, July and August from the profits made during the first five months of the year *and this is exactly what we do find* [Appendix 1. See Def's. Exhs. C and D, Tr. pp. 126-127, which visualize the situation].

Average Monthly Profit or Loss.

	Without Depreciation.	With Depreciation
First five months of year	$8,296.09	$5,421.23
June, July and August	2,598.03	— 303.73

For the next three months, namely, the suspension period, the average price obtained by plaintiff was even lower than that of June, July and August, averaging only 6.084¢ per gallon [Appendix 4, Def's Exh. B].

It inevitably follows that for these three months of suspension, plaintiff's average profit would have been lower or its average losses would have been greater than for the months of June, July and August.

Yet the court found that the profits plaintiff would have made during this suspension period were approximately three times the profit it made during June, July and August without deduction for depreciation.

It is obvious that the falacy in the method used by the court in arriving at its findings is the failure to take into consideration the break in the market at the end of May and the consequent sharp drop in prices for the remainder of the year [Appendix 4, Def's. Exh. B].

It will be remembered that the figure arrived at by the court as representing plaintiff's profits for the suspension period was arrived at by taking the average profit for the *entire eight months* preceding the fire and assuming that plaintiff would have made the same average profit for the suspension period [Tr. pp. 152 q, 205, 238]. In order, therefore, to support the finding of the court, we must assume that the same profit would have been made by plaintiff when the price it received for its product was 6.084¢ per gallon as it had made when it received 6.568¢ per gallon for that product, this being the average price received for these eight preceding months. In other words, we must assume that a drop of practically ½¢ a gallon made no difference in the profit plaintiff would have made. This is an obvious absurdity, especially since under plaintiff's own estimate [Ptf's. Exh. 7, Tr. p. 124] the average cost of manufacture of that product would have been the same during the suspension period as during these eight preceding months.

Reduced to its simplest terms, the assumption of Mr. Young, plaintiff's auditor, and of the court is that with the cost of production remaining constant, the producer would make the same profit whether his sales price was 6½¢ or 6¢ per gallon.

Since the price obtained during the suspension period (6.084¢) though lower, more closely resembled the aver-

age price obtained during June, July and August (6.203¢) than it did the average price obtained for the entire eight preceding months (6.568¢), these last three months obviously furnish a much better criterion than that average price for the eight months as to what would have been plaintiff's experience during the suspension period had no fire occurred [Appendix 4, Def's. Exh. B.] Even this, however, gives a result more favorable to the plaintiff than the actual facts justify because of the average lesser prices obtainable during the suspension period even than during June, July and August [Appendix 4, Deft's. Exh. B].

However, using June, July and August as our basic period, we find that, without taking depreciation into consideration, plaintiff would have made an average profit for June, July and August of $2,598.03 [Appendix 1]. Multiply this by 3 and add 10% and the $3,901.15 and we get $12,474.66 as plaintiff's profits for the entire suspension period.

Since the court found the plaintiff would have made a profit of $22,974.94 for the suspension period this is equivalent to finding that for that suspension period of three months plaintiff would have made a monthly profit of almost twice its profit for June, July and August without deduction for depreciation, and this despite the fact that the average price of gasoline was lower during the suspension period than during these months of June, July and August.

If we consider depreciation, plaintiff instead of making a profit for June, July and August, would have operated at a loss of $911.19 for this period. As prices for gaso-

line continued to drop appreciably lower during the suspension period, but the cost of manufacturing would have remained practically constant, the 10% increase in business would not have changed this loss to a profit. Had there had been no fire depreciation would have continued so that, even allowing plaintiff the full $3,901.15 for the polymerization unit, it would only have made a profit of $2,989.96 for that suspension period.

Obviously then, if this method be the correct method to employ, the finding of the court of profit that would have been made by plaintiff is without support in the evidence and is excessive by at least $19,984.98.

(c)

Taking the Months Immediately Preceding and Immediately Following the Fire as the Basis.

If we use as the basis the months of August and December, we find that the average price per gallon received by plaintiff for its gasoline during these two months was 6.033¢, whereas the average price obtained by plaintiff for its gasoline during the suspension period was 6.084¢, a difference of 1/20¢ per gallon [Appendix 4, Def's. Exh. B]. Consequently the prices received during August and December and those during the suspension period more closely approximate each other than do the prices received during the suspension period and either of the other two periods considered, namely, the eight preceding or the three preceding months.

According to plaintiff's own books, without consideration of depreciation, plaintiff made a profit for the combined months of August and December of $801.19, during the latter of which months the polymerization unit

was in operation [Appendix 1]. If this is divided by two and multiplied by three it would give a total profit of $1,201.80 for the suspension period. On the other hand if depreciation is taken into consideration the total *loss* to plaintiff for the months of August and December is $5,641.28 [Appendix 1]. This divided by two and multiplied by three would give a total loss for the suspension period of $8,461.92.

We would now ask the court to look at the following table remembering that the figures for August and December are taken from plaintiff's own records:

Profits or Losses.

As shown by plaintiff's books:

	August	Average per month for suspension period.	December.
Without depreciation	$ 456.96	$ 400.60	$ 344.23
Depreciation considered	— 2,578.03	— 2,820.64	— 3,063.25
As found by the trial court		7,658.24	

With the August and December figures established by plaintiff's own books, with prices very similar, and with the polymerization unit actually in operation in December, which of the following lines (taken from the above tabulation) make sense, remembering that the first line represents the finding of the court, and the second line, the contention of the defendant?

August.	Average per Month suspension period	December.
—$2,578.03	$7,658.24	—$3,063.25
— 2,578.03	— 2,820.64	— 3,063.25

Even if depreciation could be eliminated, which of the following lines (taken from said tabulation) seems reasonable, again remembering that the first line represents the finding of the court, and the second line the contention of the defendant?

August.	Average per Month suspension period.	December.
$456.96	$7,658.24	$344.23
$456.96	400.60	344.23

It certainly would be remarkable if plaintiff would have made an *average monthly profit* for the suspension period (September, October and November) of $7,658.24 which is what the court found it would have made, when in fact for the months of August and December it only made profits, without any deduction for depreciation, of $456.96 and $344.23, respectively. This would be especially curious since the average price of gasoline during each period was approximately the same and since the polymerization unit was in operation throughout December. *To support the finding of the court we must not only ignore depreciation but assume plaintiff would have made during the suspension period an average profit more*

than 19 times as great as its average profit for August and December.

We submit that if we use as our basis the entire eight months preceding the fire but do consider depreciation as a factor in determining profits, or if we use as our basis the three months from the break in the market to the fire even irrespective of the question of depreciation, or if we use as our basis the months immediately preceding and following the fire, again even irrespective of the question of depreciation, the result is the same, it appears beyond doubt that the plaintiff would not have made the profit or anything like it which the court found it would have made. The finding of the court is, therefore, clearly unsupported by the evidence and the award based thereon greatly excessive.

METHOD B.

Based on Cost of Gasoline to Plaintiff.

Again any one of the three periods may be used as a basis.

(a)

Taking the Eight Months Preceding the Fire as the Basis.

During the first eight months of the year plaintiff purchased and manufactured 6,640,260 gallons of gasoline at a total cost of $320,892.06. This gives an average cost per gallon of gasoline of 4.833¢. During the suspension period the plaintiff purchased 3,104,715 gallons of gaso-

line at a cost to it of $174,329.74 [Appendices 2 and 3]. These figures give the following table:

Total gallons purchased in suspension period	3,104,715	
Actual cost thereof........................		$174,329.74
Average cost per gallon for all gasoline manufacture and purchased for eight months prior to the fire	$ .04833	
3,104,715 multiplied by $ .04833		150,050.87
Excess of cost during suspension period		$ 24,278.87
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	24,278.87	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 8,696.81
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during suspension period		$ 4,795.66

(b)

Taking the Three Months Preceding the Fire as the Basis.

If, however, we consider only the three months immediately preceding the fire the computation is as follows:

Total gallons purchased in suspension period	3,104,715	
Actual cost thereof		$174,329.74
Average cost per gallon for all gasoline manufactured and purchased for the three months prior to the fire........	$ .04912	
3,104,715 multiplied by $ .04912		152,503.60
Excess of cost during suspension period		$ 21,826.14
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	21,826.14	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 11,149.54
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during the suspension period		$ 7,248.39

(c)

Taking the months Immediately Preceding and immediately Following the Fire as the Basis.

The computation is as follows:

Total gasoline purchased during suspension period	3,104,715	
Actual cost thereof		$174,329.74
Average cost per gallon for all gasoline manufactured and purchased in August and December	$ .04864	
3,104,715 x $ .04864		151,013.34
Excess of cost during suspension period		$ 23,316.40
Actual loss plaintiff sustained during the suspension period	$32,975.68	
Excess cost during suspension period	23,316.40	
Loss at which plaintiff would have operated even had cost of gasoline remained constant		$ 9,659.28
Saving from polymerization unit		3,901.15
Loss even if manufacture of gasoline had continued during the suspension period		$ 5,758.13

It is obvious that if this be the correct method of ascertaining what results plaintiff would have had during the suspension, it would have sustained a loss for that period instead of making a profit, and this is so no matter which period we use as the basis of our computation.

METHOD C.

Plaintiff's Actual Experience After the Fire.

Had it not been for the fire plaintiff would have manufactured a certain amount of gasoline during the suspension period. It actually purchased 3,104,715 gallons of gasoline during that period [Appendix 3]. Plaintiff itself introduced its Exhibit 7 [Tr. p. 124, Appendix 5] to show that the extra cost of purchasing this *entire* 3,104,715 gallons of gasoline was $30,995.94. However, admittedly plaintiff in any event would have purchased a certain amount of this gasoline. On the trial plaintiff estimated this amount which it would have so purchased at 14%, being the same percentage as it had purchased during the entire preceding eight months. Accepting for the moment plaintiff's estimate of the amount it would have purchased in any event, the extra cost of $30,995.94 must be reduced by this 14% as that much of the extra expense would have been incurred anyhow. The extra cost of purchasing gasoline over manufacturing it attributable to the fire is, therefore, 86% of $30,995.94 which equals $26,656.51.

Obviously this saving of $26,656.51, even had plaintiff been able to make it by continuing to manufacture gasoline, falls far short of being enough to have wiped out its admitted loss for the suspension period of $32,975.68. [Ptf's. Exh. 1, Tr. pp. 67, 251-252].

Even if we add to this saving of $26,656.51 the entire further saving of $3,901.15 which plaintiff claims it would have made from the polymerization unit, we only get a total saving, had there been no fire, of $30,557.66 which

still would be insufficient to turn a loss of $32,975.68 into a profit.

The above may be readily visualized in the following tabular form:

Using Plaintiff's Estimate of Gasoline It Would Have Manufactured During Suspension Period.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons........	3,104,715	
Percentage of gasoline plaintiff purchased from January to August, inclusive	14%	
Percentage of gasoline plaintiff manufactured during these 8 months	86%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
86% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	26,656.51	26,656.51
Actual loss less extra cost of manufacturing gasoline		$ 6,319.17
Claimed savings to have been made on polymerization unit....		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		2,418.02

The fallacy in plaintiff's estimate of the amount of gasoline it would have purchased anyway, is exactly the same as its fallacy in using the eight months preceding the fire as the basis for determining its profits or loss for the suspension period. Just as the price received by plaintiff for its gasoline broke at the end of May, so also did the prices which plaintiff had to pay for the gasoline it purchased. For the first five months of the year plaintiff was paying an average of 6.968¢ per gallon for the gasoline it purchased, whereas, in June, July and August it paid almost a cent a gallon less, namely, an average of 6.016¢ a gallon [Appendix 3].

With the cost of manufacture remaining constant, it might readily be expected that plaintiff would largely increase the proportion of gasoline which it purchased rather than manufactured during this period of lower prices payable by it. *This is exactly what we find it did do.* For the first five months of the year plaintiff's average monthly purchases were 61,377 gallons, or 7½% of its total gallonage. For June, July and August these purchases increased to an average of 205,755 gallons per month and amounted to 23% of its total gallonage [Appendix 3].

During the suspension period the cost to plaintiff per gallon of gasoline purchased dropped almost another half cent to an average of 5.618¢ per gallon [Appendix 3]. The conclusion is inevitable that plaintiff in the ordinary course of events would have purchased an even greater proportion of its gasoline during the suspension period than during those months of June, July and August.

77% (being the June, July and August percentage of gasoline manufactured) of the 3,104,715 gallons which plaintiff purchased during the suspension period equals 2,390,630 gallons.

Startling conformation of this as the amount which plaintiff would have purchased in any event is found in another and very interesting method of estimating the amount of gasoline which plaintiff would have purchased during the suspension period even had there been no fire. In September plaintiff's business increased 1.6% over August. This percentage added to the amount actually manufactured in August would give a figure of 744,770 as the amount it would have manufactured in September. In the same way we reach the figure of 793,370 gallons for October, 834,934 for November, *and 872,319 for December.* These computations are set forth in Defendant's Exhibit E, Tr. pp. 129, 351. Plaintiff resumed operations in December and in that month *actually manufactured 875,648 gallons* [Tr. p. 271], which it will be observed varies by less than a half a per cent from the amount estimated in Defendant's Exhibit E as that which plaintiff would have manufactured for that month had there been no interruption in its business, and had the cost to it of purchased gasoline remained the same.

On this basis plaintiff would have manufactured 2,373,074 gallons during the suspension period out of the 3,104,715 gallons actually purchased by it. In other words plaintiff would have manufactured 76% of its gasoline.

It is certainly very significant that the percentage of gasoline which plaintiff would have manufactured arrived

at by the method used in Defendant's Exhibit E and which is proved to be extremely accurate by the amount of gasoline plaintiff actually did manufacture in December, gives practically the same result (76% as against 77%) as an estimate based upon the percentage of gasoline manufactured during June, July and August, that is after the drop in cost to plaintiff of purchased gasoline.

Using as our basis the actual increase in the plaintiff's business, we have reached a figure of the amount of gasoline plaintiff would have manufactured which is within ½% of the amount it actually did manufacture in December, but we have argued that the percentage of gasoline which it did manufacture rather than purchase varied with the cost to it of purchased gasoline. Therefore, if we are correct, we should find that the cost of purchased gasoline to plaintiff was approximately the same in December as it was immediately prior to the fire. *And again this is exactly what we do find.* The average cost to plaintiff for gasoline purchased by it in August was 6.070¢ per gallon, while in December it was 6.113¢ or a difference of only .043¢ per gallon [Appendix 3].

We, therefore, submit that our estimate that plaintiff would only have manufactured 77% (we are using this figure as more favorable to plaintiff than 76%) of its gasoline during the suspension period even had no fire occurred is shown logically, mathematically and from plaintiff's actual later experience to be highly accurate and to be infinitely more so than the 86% estimate adopted by plaintiff's auditor, and based on experience when market conditions were very different.

Now let us tabulate the result if we use as the basis the months of June, July and August; that is, the period after the break in the market.

Using the Percentage of Gasoline Plaintiff Manufactured During June, July and August.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons........	3,104,715	
Percentage of gasoline which plaintiff purchased in June, July and August	23%	
Percentage of gasoline which plaintiff manufactured during these three months	77%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
77% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	23,866.87	23,866.87
Actual loss less extra cost of manufacturing gasoline		$ 9,108.81
Claimed saving to have been made on polymerization unit....		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline....................		$ 5,207.66

We submit that the only inaccuracy in our estimate lies in the fact that we have not taken into consideration the fact that during the suspension period the price paid by plaintiff for purchased gasoline was less than either before or after the suspension period and that, therefore, plaintiff probably would have purchased even greater proportion of its gasoline during the suspension period than our figures show, which of course would give results even less favorable to plaintiff than those at which we have arrived by using our said estimate. Yet, based on our estimate of 77% of its total gallonage as the amount of gasoline plaintiff would have manufactured and using plaintiff's own figures as to the cost of manufacture, we find, as shown in the last table above, that plaintiff would have operated for the suspension period at a loss of $5,207.66.

If we use as the percentage of gasoline which plaintiff would have manufactured during the suspension period, that percentage of gasoline which it actually did manufacture during August and December, the months immediately preceding and following the fire, namely 72%, the extra cost of purchasing gasoline during the suspension period is reduced to 72% of $30,995.94 and we get the following table:

Using the Percentage of Gasoline Plaintiff Manufactured During August and December.

Actual loss for suspension period		$32,975.68
Gasoline purchased, gallons..........	3,104,715	
Percentage of gasoline which plaintiff purchased in August and December	28%	
Percentage of gasoline which plaintiff manufactured during August and December	72%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
72% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	22,317.08	22,317.08
Actual loss less extra cost of manufacturing gasoline		$10,658.60
Claimed savings to have been made on polymerization unit....		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		$ 6,757.45

In December, the month immediately following the suspension period the polymerization unit was in operation and plaintiff was therefore making upon its manufactured gasoline whatever savings resulted therefrom. Moreover, in December plaintiff manufactured more gasoline

than in any previous month and the cost to it of the gasoline it purchased was higher than at any time since the break in the market at the end of May. Yet, in December it manufactured only 67% of its total gasoline. If we use December as the basis, we get the following table:

Using the Percentage of Gasoline Plaintiff Manufactured During December.

Actual loss		$32,975.68
Gasoline purchased, gallons	3,104,715	
Percentage of gasoline which plaintiff purchased in December	33%	
Percentage of gasoline which plaintiff manufactured in December	67%	
Extra cost of purchasing entire 3,104,715 gallons over manufacturing same	$30,995.94	
67% of $30,995.94 to represent extra cost of purchasing instead of manufacturing gasoline	20,767.28	20,826.63
Actual loss less extra cost of manufacturing gasoline		$12,208.40
Claimed saving to have been made on polymerization unit		3,901.15
Loss for suspension period even had plaintiff manufactured this amount of gasoline		$ 8,307.25

Again looking at the matter in an entirely different manner, if we are to accept plaintiff's contentions, namely, that it would have made the same profit for each of the months of the suspension period as it had on the average made for the first eight months of the year, then we would expect that after it resumed operations in December it would still have made that same profit for that month of December, and this exclusive of any profit from the polymerization unit, or would have made a greater profit for December if that unit is taken into consideration, since it was not in operation at any time during the eight months prior to the fire, but was in operation in December. *Plaintiff made no such profits in December.* On the other hand, if we are to accept the defendant's contention that a loss would have been sustained in each of the months of suspension period, then we would expect that plaintiff's actual operations in December would also result in a loss, though this loss might be slightly less owing to the fact that the price of gasoline rose from an average of 6.084¢ for the suspension period to 6.093¢ for December, and also because of the polymerization unit. *This is exactly what did occur.* Let us now examine the actual results of plaintiff's operations for December. Taking depreciation into consideration plaintiff operated in December at a *loss* of $3,063.25 as against an average monthly profit for the eight months preceding the fire of $3,274.37 [Appendix 1]. Three times the actual December loss is $9,189.75 which it will be noted very closely approximates the loss, namely, $9,108.81, arrived at by us by using as the basic period to be considered the three months immediately preceding the suspension period, a

period when market conditions were much the same as in December. Without taking depreciation into consideration plaintiff would have operated at a profit of only $344.23 for the month of December as against an average profit of $6,159.32 for those eight months preceding the fire [Appendix 1].

That the average experience of plaintiff for the first eight months of the year furnishes no criterion as to the results of plaintiff's operations in December is conclusively shown by the actual results of these December operations. There certainly is no reason why the average experience over these eight months should furnish an any more reliable guide to plaintiff's experience during the suspension period. This is especially so since market conditions were even less favorable to plaintiff during that suspension period than they were during the month of December. It is again even more especially true when we remember that during practically the entire month of December the polymerization unit was in operation whereas even had there been no fire, it would not have been in operation for over one-third of the suspension period.

Another way of considering the matter is as follows:

Admittedly for the suspension period the plaintiff actually sustained a loss of $32,975.68 [Plf's. Exh. 1, Tr. pp. 67, 251-252]. The court found that had it not been for the fire the plaintiff would have made a profit of $22,974.94 [Tr. p. 145]. In order to have made this profit plaintiff would first have had to wipe out its loss of $32,975.68 and then in addition to have made its profit of $22,974.94. Obviously, therefore, if the finding

of the court is correct the difference made to plaintiff by the fire is the sum of these two amounts, namely $55,-950.62; yet, even taking plaintiff's own figures, including its own estimates as to the cost of manufacture of gasoline and the amount of gasoline it would have manufactured during the suspension period, the excess cost of manufacturing rather than purchasing gasoline amounted only to $26,656.51, being the $30,995.94 shown in Plaintiff's Exhibit 7 [Tr. p. 124], less 14% for gasoline plaintiff admits it would have purchased in any event. This is somewhat less than half of the spread between what plaintiff actually lost and what the court found it would have made. It seems to us too obvious for words that a saving even of $26,656.51 would not obliterate a loss of over $30,000.00, much less change that loss into a profit of over $22,000.00. Yet, as we have said, in this particular computation, we are accepting plaintiff's own figures and plaintiff's own estimates in *toto*.

In order to have turned the actual loss sustained by plaintiff during the suspension period into the profit for that period that the court found plaintiff would have made, it would have been necessary for plaintiff during that suspension period:

1. To have made its saving of $26,656.51 by manufacturing rather than purchasing gasoline;

2. To have made its full claimed savings of $3,901.15 from the polymerization unit; and

3. To have obtained $25,392.96 more from the sale of its gasoline than it actually did obtain during that period.

As it sold 3,104,715 gallons of gasoline during this period, it would have been necessary for it to have obtained .811¢ per gallon in excess of what it did obtain in order to make up this extra $25,392.96.

The average price actually received by plaintiff for gasoline during the suspension period was 6.084¢ per gallon. To have made up the $25,392.96 it would have had to have obtained 6.895¢ per gallon. The average price it obtained for the first eight months of the year was 6.568¢ per gallon, and the average for the first five months of the year, that is before the break in the market, was 6.787¢ per gallon.

Actual figures furnished by plaintiff, even accepting its own estimate of the amount of gasoline it would have purchased anyway during the suspension period, establish that had plaintiff received the same average price for its gasoline during that suspension period as it received during the first five months of the year, it would still have operated at a loss; that had it received during that suspension period the same average price per gallon as it received during the first eight months of the year, its loss would have been considerably greater; that had it received during that suspension period the same average price per gallon as it received during the three months immediately preceding the fire, its loss would have been still greater.

The only condition upon which plaintiff could have made the profit which the court found it would have made, would be for plaintiff to have received for its gasoline approximately the peak price of the year during a period when in fact these prices were at their lowest.

It is submitted that the only way in which the finding made by the trial court that, plaintiff would have made a profit of $22,974.94, may be supported is to ignore both depreciation and the break in prices caused by the gasoline war, and arbitrarily to assume, *in the face of actual figures to the contrary,* that plaintiff would have made the same profit during the suspension period as it made during the first eight months of the year. This is an obviously false premise in view of the very figures submitted by plaintiff and just discussed which prove that even had prices remained at the same average during the suspension period as they averaged during the first eight months of the year, plaintiff would still have operated at a loss for that suspension period. It is an even more false premise in view of the admitted fact that prices did drop sharply in June with not only an immediate and very marked decrease in plaintiff's profits, but with, by August, a change in the results of plaintiff's operations from a profit to a loss.

If we consider the actual figures submitted by plaintiff itself, even as applied to the entire eight month period, or if we consider the results of the break in the market, or if we take into consideration plaintiff's experience thereafter, or if we consider plaintiff's experience for the months immediately preceding and immediately following the suspension period, or if we consider plaintiff's actual experience during that suspension period, the result is always the same. Plaintiff could not have operated at a profit but would have operated at a substantial loss during that suspension period even had its business of manufacturing gasoline not been prevented by the fire.

It is to be remembered that this is not a case in which there is any conflict whatever in the evidence and that in all our calculations we have not used a single figure except those furnished by plaintiff itself and as shown by plaintiff's own books.

The finding of fact made by the trial court that plaintiff would have earned profits of $22,974.94 had it not been for the fire, is not only entirely unsupported by but is in direct conflict with all the evidence in this case.

X.

Polymerization Unit.

So far in our figures we have allowed the plaintiff the full amount of saving which it claims it would have made from the polymerization unit. The court will remember that this unit was not in existence at the time of the fire. In the case of *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Co.* (C. C. A. 4), 64 Fed. (2d) 347, the insured intended closing a portion of its mine known as seam #10. It was feared that the further operation of this seam would endanger the more profitable operations from seam #12. The closing of seam #10, however, would have entailed a loss to the assured, consisting mostly of its capital invested therein. Inasmuch as the insured had intended, in any event, to close this seam, the defendant company contended that its loss from the closing of the seam should be deducted from the anticipated profits of its business as said business was being conducted at the

time of the fire. The court, however, at page 353, held to the contrary:

> "And we agree also that the item of loss resulting from the intended closing of the mine in seam No. 10 is not to be deducted from profits. The profits which the policies guarantee are those which would have been earned above immediate cost of production and fixed charges if the business had not been interrupted; and the fact that the company sustained a loss due to closing down an unprofitable venture would not diminish the profits realized from carrying on a venture that was profitable."

The rule must work both ways. There is not one law for an insured and another for an insurer. If the defendant in the *Fidelity* case was not entitled to a credit for an *anticipated* change in operations that would have reduced the plaintiff's profits, likewise, the plaintiff in the present case is not entitled to an increase because of an *intended* operation, even if that *intended* operation would have resulted in a profit.

Moreover, there is no substantial evidence in the case as to what the result of the operation of the polymerization plant would have been. It is true that Mr. Devere, plaintiff's president, testified that by using a certain formula he arrived at the figure of $3,901.15, and that experience showed that the actual profits from the plant were even greater. However, Mr. Devere did not back up this testimony with any facts or figures, nor show what

was the actual experience with this polymerization plant [Tr. pp. 202-204].

As we have previously shown in this brief the testimony of Mr. Devere was shown to be absolutely contrary to facts when he testified that market conditions remained the same throughout the year; that the fluctuation of profit was caused by plaintiff's endeavors to increase the capicity of its plant; that plaintiff increased its business 20% for the suspension period over the three preceding months, and that the increase in plaintiff's business for November was over 20% of that of August, and that of December over August was 30 to 35%. Consequently we submit that no reliance can be placed upon the general conclusions testified to by him in the absence of a specific showing of the actual results of that polymerization unit after it had once been placed in operation.

We submit neither under the law nor under the evidence in this case can there be any allowance made to plaintiff on account of the claimed profits of the polymerization unit. We, therefore, believe that from all the foregoing figures where they show a profit to the plaintiff there should be deducted the sum of $3,-901.15; that where these figures show a loss that sum should be added thereto; and that the inclusion of this item in the amount awarded to the plaintiff was improper.

XI.

Conclusion.

For each of the foregoing reasons, namely, the failure of the complaint to state a cause of action against the defendant, the failure of the findings to support the judgment rendered, and the insufficiency of the judgment to sustain the finding of the trial court that during the suspension period the plaintiff would have earned a profit from the business prevented by the fire, it is respectfully submitted that the judgment in this case in favor of the plaintiff should be reversed.

Respectfully submitted,

W. O. Schell,

Gerald F. H. Delamer,

Attorneys for Appellant, General Insurance Company of America, a corporation.

Appendix 1.

PROFIT OR LOSS DURING PERIODS OF ACTUAL MANUFACTURE.

[Plaintiff's Exhibit 1, Tr. pp. 68, 273-274, 345.]

Months	Without Depreciation.	With Depreciation.
January	$ 3,990.17	$1,752.19
February	8,460.97	5,438.77
March	8,972.44	6,021.90
April	8,684.92	5,643.80
May	11,371.94	8,249.49
June	3,094.49	734.88
July	4,242.65	931.95
August	456.96	— 2,578.03
December	344.23	— 3,063.25

Depreciation as shown by plaintiff's books and as reported on the Federal Income Tax Returns for the suspension period was as follows [Tr. p. 274]: September $90.79; October $97.17; November $168.70.

Total profit, first eight months, without depreciation	$49,274.54
Total profit, first eight months with depreciation	26,194.95
Total profit, June, July and August without depreciation	7,794.10
Total loss, June, July and August depreciation being taken into consideration	— 911.20
Average profit, first five months, without depreciation	$8,296.09
Average profit, June, July and August, without depreciation	2,598.03
Average profit, first five months, with depreciation	5,421.23
Average loss, June, July and August depreciation being taken into consideration	— 303.73

Appendix 2.

GASOLINE MANUFACTURED.
[Rep. Tr. pp. 271-272.]

Month.	Total gallonage.	Cost per gallon in cents.	Cost per gallon in dollars.
January	587,717	5.015	.05015
February	716,637	4.525	.04525
March	732,480	4.483	.04483
April	759,760	4.436	.04436
May	773,825	4.565	.04565
June	605,771	4.842	.04842
July	806,877	4.447	.04447
August	733,041	4.550	.04550
Average cost per gallon, first five months		4.605	.04605
Average cost per gallon, June, July and August		4.613	.04613
Percentage of gasoline manufactured, first five months			92%
Percentage of gasoline manufactured, June, July and August			77%

Appendix. 3.

Gasoline Purchased.

[Rep. Tr. pp. 267-271, 313-315, 320-321.]

Month.	Total gallonage.	Cost per gallon in cents.	Cost per gallon in dollars.
January	39,201	6.750	.06750
February	54,150	6.948	.06948
March	53,803	7.166	.07166
April	69,907	7.046	.07046
May	89,826	6.932	.06932
June	200,670	5.912	.05912
July	223,947	6.066	.06066
August	192,648	6.070	.06070
September	959,970	5.690	.05690
October	1,039,874	5.609	.05609
November	1,104,871	5.555	.05555
December	430,392	6.113	.06113
Average, first five months		6.968	.06968
Average, June, July and August		6.016	.06016
Average, suspension period		5.618	.05618
Average, August and December		6.091	.06091

Appendix 4.

GASOLINE SOLD.
[Rep. Tr. pp. 258-261.]

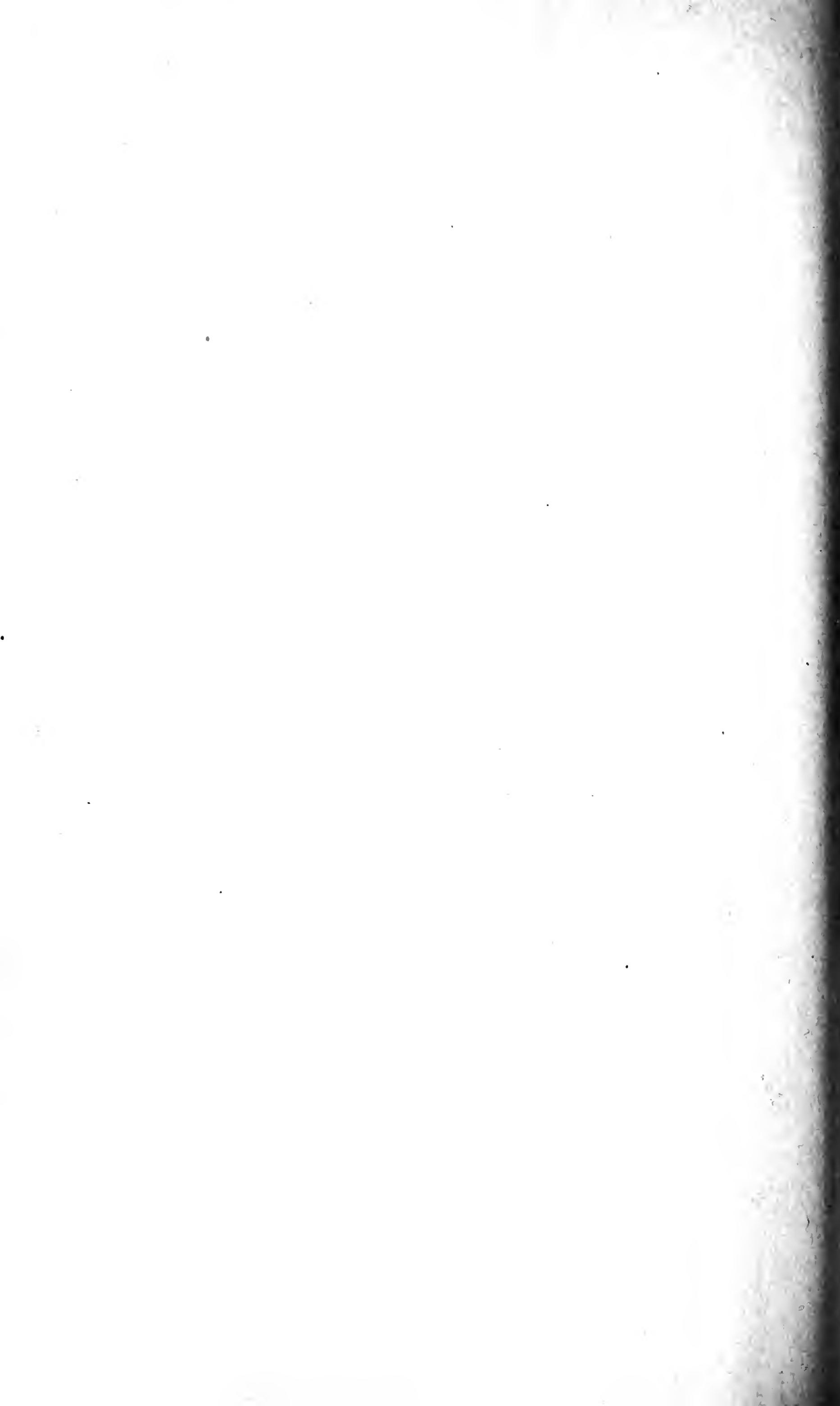
Month.	Total gallonage.	Price received per gallon in cents.	Price received per gallon in dollars.
January	604,022	6.485	.06485
February	757,774	6.561	.06561
March	809,216	6.671	.06671
April	841,797	7.014	.07014
May	784,606	7.203	.07203
June	909,440	6.467	.06467
July	874,103	6.171	.06171
August	962,846	5.973	.05973
September	978,121	6.177	.06177
October	1,042,045	6.146	.06146
November	1,096,298	5.928	.05928
December	1,145,562	6.093	.06093
Average price first eight months		6.568	.06568
Average price first five months		6.787	.06787
Average price June, July and August		6.203	.06203
Average price suspension period		6.084	.06084
Average price August and December		6.033	.06033

Appendix 5.

[Plaintiff's Exhibit 7, Tr. pp. 124, 313.]

	Manufacturing Cost per gal.
January	.05015
February	.04525
March	.04483
April	.04436
May	.04565
June	.04842
July	.04447
August	.04550
	.36861÷8=8 month
	average .04608 per gal.

	Purchases	Average mfg. cost.	Difference in cost.	Gallons purchased.	Loss.
September	.05673	.04608	.01065	959,970@.01065	$10,123.68
October	.05609	.04608	.01001	1,039,874@.01001	10,409.13
November	.05555	.04608	.00947	1,104,871@.00947	10,463.13
Loss because of outside purchases					$30,995.94



No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee.

Reply on Behalf of Appellant, General Insurance Company of America, a corporation, to Petition For Rehearing.

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COPY

GEORGE PENNEY

458 South Spring Street

LOS ANGELES, CAL

October 6, 1944

The Honorable Judges of the
U. S. Circuit Court of Appeals
San Francisco, California.

Gentlemen:

Re: No. 10494 - General Insurance Co. of America vs. Pathfinder Petroleum Co.

While we would not ordinarily respond to a reply to a petition for rehearing, we do feel constrained to point out that, in addition to other reasons, the case of Fidelity-Phoenix Insurance Co. v. Benedict Coal Corp. (C.C.A.4), 64 Fed. (2d) 347 at 353, referrred to on page 4 of the reply of the General Insurance Company of America, is not applicable to the situation in the case at bar because, as the record clearly shows, there was not a total destruction of the property in the case at bar as there was in the case relied upon by the Feneral Insurance Company of America. General Insurance Company of America itself admits that the destruction applied only to a portion of the plant.

The most unusual statement, however, of the entire reply is the following sentence, found on page 4.

"If any depreciation should have been considered under Item II, it is to be presumed that the trial court did so consider it."

The record, however, clearly shows, again, that the trial court did not consider any depreciation in connection with Item II; and, since we cannot construe the statement in the reply as anything but a left-handed admission that depreciation would have been proper under Item II, we cannot see why, in justice, we should now penalized because, in presenting the case before the trial court, we put depreciation in the wrong column.

If the General Knsurance Company had taken the position which it took in the passage just quoted, the trial court would surely have permitted an amendment in accordance with such a theory. We therefore earnestly urge again that this honorable court give additional consideration to the matter of depreciation and that the obvious injustice to the Pathfinder Petroleum Company resulting from

a technical position of the insurance company be rectified.

Respectfully submitted,

GEORGE PENNEY
JEAN WUNDERLICH
EARL GLEN WHITEHEAD

JW/s
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No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

General Insurance Company of America, a Corporation,

Appellant,

vs.

Pathfinder Petroleum Company, a Corporation,

Appellee,

and

Pathfinder Petroleum Company, a Corporation,

Appellant,

vs.

General Insurance Company of America, a Corporation,

Appellee.

Reply on Behalf of Appellant, General Insurance Company of America, a corporation, to Petition For Rehearing.

Because of two misstatements of fact contained in the petition for rehearing filed in the above entitled matter

by Pathfinder Petroleum Company, a corporation, we respectfully request permission to file this reply to said petition.

I.

Petitioner claims that if, under Item I of the policy, depreciation is deducted from gross profits in arriving at net profits, then that depreciation should be allowed as an item of fixed charge under Item II of the policy, and that consequently it does not matter whether depreciation is taken into consideration as (petitioner claims) it would not affect the final result.

Petitioner then says on page 6, "In conformity with the theory on which this case was tried without objection, depreciation should be eliminated from the fixed charges, and by the same token it *not be deducted from the profits.*" (Italics in petition.)

We emphatically deny that the case was tried on any such theory. It has always been the contention of appellant, General Insurance Company of America, that depreciation is an item of current expense, and is one of the items which must be deducted from gross profits in order to arrive at net profits. In fact this contention was very strongly urged upon the trial court at all times during the trial of the case, and was also urged all through our briefs upon appeal.

Thus, we would refer the court to page 303 of the transcript on appeal where the following appears:

> "Mr. Delamer: We claim in estimating whether or not you made any profit you must consider depreciation. You have not considered depreciation in arriving at what you claim to be the net profit."

Likewise, we would call the court's attention to defendant's Exhibits C & D [Tr. pp. 126 and 127, 346 and 347], showing the relationship between profits with and without depreciation and selling prices.

Likewise, on page 36 of our opening brief, we made the following direct statement:

> "Depreciation must, however, be taken into consideration. It is an item of expense of doing business like any other item and may not be ignored. (*Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C.C.A. 4), 64 Fed. (2d) 347 at 353)."

Again, in view of the fact that we contended that the trial court did not deduct depreciation in arriving at the net profits, but that such depreciation should have been so deducted, all of the figures in our briefs were given with and without depreciation.

Likewise, we contended in the trial court that depreciation occurring before the fire did not continue thereafter since destroyed property did not depreciate. Thus, we introduced evidence as to the portion of the plant which was destroyed by the fire [Tr. pp. 226-229], and also expert testimony that depreciation after the fire would not be the same as depreciation before the fire [Tr. p. 370].

Evidence of the amount of depreciation was introduced, and this court has held that the trial court did not allow an erroneously small item of depreciation as a deduction from gross profits. What, if any, allowance the court made under Item II for such depreciation as would continue after the fire cannot be determined from the record

in view of the peculiar basis adopted by the trial court in arriving at its judgment under Item II of the policy. If any depreciation should have been considered under Item II, it is to be presumed that the trial court did so consider it.

As said by this court in its opinion (page 8) in affirming that portion of the judgment of the trial court with reference to Item 2:

> "There is no showing of prejudice in the amount awarded. On this ground we sustain the award of $7,348.63."

In this connection we would again call this court's attention to the case of *Fidelity-Phenix Insurance Co. v. Benedict Coal Corp.* (C.C.A. 4), 64 Fed. (2d) 347, at 353:

> "And we agree with the learned judge in his dealing with depreciation and depletion under the heading of fixed charges. Depreciation on property which has been destroyed is not to be allowed as a fixed charge, even though it must be considered in estimating profits which would have been earned if the business had gone on; for manifestly property which has been destroyed cannot depreciate."

We repeat our statement and the record, both in the trial court and on appeal, substantiates that statement, that this case was NOT tried upon the theory, or any similar theory, that depreciation should be eliminated from the fixed charges and by the same token it not be deducted from the gross profits in order to arrive at net profits.

II.

Petitioner also states:

> "We believe that these portions of the opinion are plain and that, in conformity therewith, the total amount of the judgment thereunder is the sum of $7,348.63 on account of fixed charges, and $3,901.15 on account of the polymerization plant, or a total of $11,249.78 plus interest. To our surprise, however, we find in discussions with the attorneys for the insurance company, that they construe the closing paragraph of the court's opinion to mean that the question of the profits on the polymerization plant must be relitigated."

Again petitioner has misstated our position.

We understand this court to have held that had there been no fire the use of the polymerization plant would have saved to the plaintiff the sum of $3,901.15, which would not have been saved to the plaintiff had it not been for such polymerization plant.

We understand the decision of this court to be that in arriving at the profit or loss which the plaintiff would have made or sustained during the suspension period had it not been for the fire, this saving of $3,901.15 must be taken into consideration.

We do not understand the decision of this court to be that the plaintiff is entitled to the sum of $3,901.15 as a separate amount to be recovered by it so that in any event it should recover this amount of $3,901.15 under Item I of the policy in addition to the $7,348.63 under Item II of the policy.

We understand the decision of this court to be that if, under Item I, taking this $3,901.15 into consideration, the plaintiff would have made a net profit during the suspension period, then the plaintiff is entitled to such net profit in addition to the fixed charges and expenses of $7,348.63 under Item II of the policy.

On the other hand, we also understand the decision of this court to be that if, notwithstanding the allowance of $3,901.15 on account of the polymerization plant, the plaintiff nevertheless *would still not have made any net profit* during the suspension period, then the plaintiff is entitled to no recovery under Item I of the policy, but is limited to the recovery of its fixed charges and expenses under Item II thereof, which fixed charges and expenses are now fixed by the judgment of the trial court, affirmed by this court, in the sum of $7,348.63.

WHEREFORE, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted,

W. O. SCHELL,

GERALD F. H. DELAMER,

Attorneys for Appellant, General Insurance Company of America, a corporation.

No. 10494.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

10

19

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a corporation,

Cross-Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Cross-Appellee.

Brief of Appellee and Cross-Appellant Pathfinder Petroleum Company.

FILED

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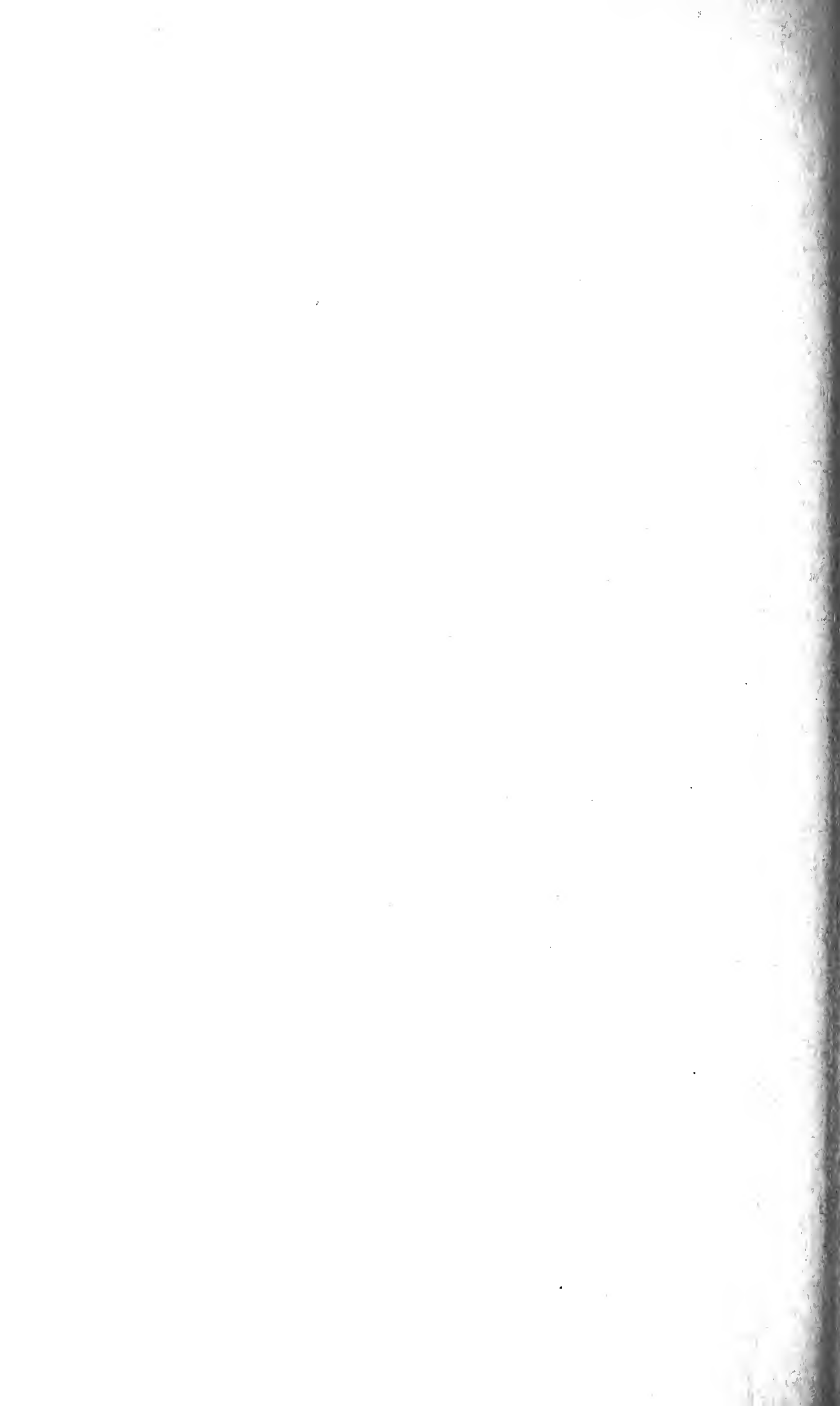

No. 10494.

IN THE

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FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a corporation,

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and

PATHFINDER PETROLEUM COMPANY, a corporation,

Cross-Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Cross-Appellee.

Brief of Appellee and Cross-Appellant Pathfinder Petroleum Company.

Jurisdictional Statement.

Jurisdiction of the District Court over the cause is based upon diversity of citizenship and upon the fact that the

amount in controversy, exclusive of costs and interest, is in excess of $3000. (28 U. S. C. A., sec. 41.)

This Honorable Court has jurisdiction to review the judgment rendered by the District Court and to entertain the cross-appeal of Pathfinder Petroleum Company by reason of the provisions of 28 U. S. C. A., section 225.

Statement of the Case.

The appeal and cross-appeal involve the interpretation of a use and occupancy policy issued to plaintiff Pathfinder Petroleum Company.* By its terms [Tr. p. 13 *et seq.*] this policy insured plaintiff against loss occurring by reason of plaintiff's inability to use and occupy the premises in consequence of destruction by fire in so far as such loss represents

A. Net profits on the business which is prevented by reason of the destruction of the premises by fire, resulting in a total or partial suspension of the business of the insured.

B. The fixed charges and expenses to the extent to which they would have been earned had no fire occurred, and consisting of salaries of indispensable employees, superintendents, executive officers, employees under contract, taxes, interest, rents, royalties, insurance premiums, and other charges as listed in the policy. [Tr. p. 14.]

After the plaintiff had been engaged in the manufacture of gasoline products for approximately eight months, a

---

*The parties are referred to throughout as plaintiff and defendant.

fire occurred on August 31, 1940, by reason of which the manufacturing operations of the plaintiff were suspended for three months.

Following the fire, and pursuant to the provisions of the policy, an extensive preliminary proof of loss was filed with the defendant, covering at length and in detail the operations of plaintiff. It occupies in the printed transcript 48 pages of figures. The length and detail of this proof of loss and the laconic reply of the insurance company thereto [Tr. p. 114] become material in the consideration of plaintiff's Point I discussing the judgment for loss of profits, as rendered by the trial court, and also its contention that the claimed loss of fixed charges which would have been earned otherwise should not have been cut in half, as was done by the existing judgment.

Reduced to their shortest form, the questions on the appeal and cross-appeal are:

1. Under the terms of the policy, the proof of loss as rendered by plaintiff was such as to require the defendant under the provisions of the policy headed "Ascertainment of Amount of Loss" [Tr. p. 34] to make specific objections thereto. The purported reply of the insurance company to the proof of loss on page 114 of the record does not contain any specific objections. The amount of loss, therefore, became fixed at the figure shown in the preliminary proof of loss.

2. In arriving at the amount of net profits which would have been made by plaintiff had it not been for the fire,

the experience of the business for the full eight months preceding the fire during which plaintiff was operating should be considered.

3. The court should have allowed the full amount of fixed charges which plaintiff was prevented from earning, as given in the proof of loss, and as developed during the trial. Its action cutting said figure in half was error under the law and the evidence.

All the specifications of error contained in the transcript, as well as on pages 18 to 21 of the opening brief, are reducible in the final analysis to these three propositions.

We believe it will add to the clarity of the presentations if the facts pertinent to our various contentions are developed in connection with the treatment of each point. Since the pleadings have been adequately summarized in the opening brief, we proceed directly to the discussion of the three main questions listed above.

ARGUMENT.

I.

Plaintiff's Proof of Loss, in the Absence of Specific Objections Thereto, Fixed the Amount of Plaintiffs Loss at the Figures Therein Stated, Especially Since the Insurer Failed to Comply With the Provisions of the Policy (a) With Respect to Manifesting Partial or Total Disagreement With the Proof of Loss and (b) in Failing to Request an Appraisal.

(a) By Failure to Voice Specific Objections the Insurer Is Deemed to Have Assented to the Amounts Claimed in Proof of Loss.

As already pointed out, plaintiff filed an extensive proof of loss covering 48 pages. This proof of loss was the result of those provisions of the policy by which the insurer had the right to request that defects in the proof of loss be remedied by verified amendments. Under the terms of the policy these alleged defects were to be "specifically" stated by the insurer. [Tr. p. 33.] It was pursuant to this request for a specific statement of matters that plaintiff's voluminous proof of loss was prepared. [Tr. pp. 51-113.]

When this preliminary proof of loss is lodged with the insurer, the insurer, under the terms of the policy,

> "shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within 20 days after the receipt thereof, or, if verified amendments have been re-

> quested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the Company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the Company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto." [Tr. p. 34.]

After having put plaintiff to the labor and expense of filing as detailed a proof of loss as the transcript reveals, defendant, in turn, did not trouble to comply in a similar spirit with the provisions of the policy. It merely sent a letter dated January 9, 1941, to the plaintiff in which it categorically stated:

> "The amount of loss which this company admits on each or all of the items specified in said preliminary proof of loss is nothing." [Tr. p. 114.]

Surely, if the insurer can require the proof of loss to be specific, the insured must have the reciprocal right to insist that the objections be specific. The insurer, therefore, should have specifically indicated which items of the detailed proof it agreed with and which items it disagreed with, rather than making a statement which amounted to nothing more than *a denial of its liability*. In other words, it is plaintiff's contention that it is entitled to a specific statement of disagreement from the insurer with respect to the amount of loss claimed on each specific item set forth in the proof of loss, and that the insurer does not fulfil that requirement of the policy by a mere categorical denial of liability.

That plaintiff had a right to something more than a mere denial of liability should be clear from the wording of the policy, and certainly is clear in the light of the case of *Lauman v. Concordia Fire Insurance Company of Milwaukee, Wisconsin,* 50 Cal. App. 609, 195 Pac. 951. In that case the plaintiff set forth in detail the items destroyed by fire, the cost, cash value, and the loss. Upon receipt of the proof of loss the defendant fire insurance company objected in the following language at page 620:

> "The aforesaid Concordia Fire Insurance Company disagrees with you as to the amount of the loss and damage claimed by you on any and all articles covered under the second item of the form as attached to the policy and described as 'merchandise' and does not admit that you sustained any loss or damage under this item by reason of said fire, as you have failed to show that the goods destroyed or damaged were your property or that you were liable by law for any loss or damage to said goods or that at any time prior to the date of the fire you had specifically assumed liability therefor, nor do you furnish any evidence as to your liability to others in the event said goods were held by you in trust at the time of the fire."

The court said, in reference to this objection:

> "The proof of loss set forth in detail the items paid by plaintiff to third parties; and if the insurance company intended to contest the amount of any particular item, it was required under the terms of the policy to specify the amount of loss it admitted on such items; otherwise it must be deemed to have assented to the *amount of the loss sustained on all items to which no specific objection was made. A general denial of all liability* would not meet the requirement of

its obligation under the policy to designate the different articles for which it disclaimed liability." (Italics by counsel.)

Plaintiff contends that the objection in the instant case is nothing more or less than a general denial and is not a specific objection to the individual items set forth in the proof of loss. The case of *Victoria Park Co. v. Continental Insurance Co. of New York,* reported in 39 Cal. App. at 347, 178 Pac. 724, lays down this rule:

"The term of the policy which required the insurer to express its disagreement with the amount of the loss claimed within the specific time, otherwise it should be deemed to have assented thereto, was a binding condition of the contract. It meant exactly what it expressed or it meant nothing. It cannot be viewed in any sense as directory; the term is inapplicable to contract conditions entered into understandingly by the parties thereto which appear to be of material import as affecting the rights of the contractors."

While this particular case is somewhat different from the case at bar in the manner in which the defendant company objected to the proof of loss, nevertheless we suggest the rule is applicable to the instant case. In commenting on the objection the court stated as follows on page 350:

"If the insurer had assumed in good faith that Watson and Barry possessed authority to negotiate for a settlement of the claims, it was put upon notice later by the service of the verified proof of loss as to what the amount of damage as asserted by plaintiff company was. At that time it should have, in keeping with the requirements of the contract of insurance, specifically announced its disagreement with the

amount of the claim in whole or in part and stated particularly what amount it did admit should be paid to the insured."

It seems perfectly logical that if the insurance company can, under the terms and conditions of the policy, force the insured to set forth in detail the amount of its loss and damage, the insurance company by the same token should be required to object specifically to each item set forth. Otherwise it is impossible to arrive at the true issues with respect to the amount of the loss and damage. To interpret this provision of the contract otherwise would be to place a burden on the insured and not a like burden on the insurance company. The insured is entitled to know which of the items, if any, the insurance company is objecting to in the proof of loss and the amount which the insurance company admits on each of the various items set forth in the proof of loss.

When the defendant contended that the plaintiff is not entitled to any portion of its loss, the only question before the court was that of liability or lack of liability under the policy. Once the trial court decided there was liability, the amount thereof was no longer subject to proof, because the defendant made no objection to any specific amount. When it rested on a denial of its liability, but made no other specific objections, it thereby waived inquiry into the correctness of the amount of loss claimed, once its liability was established. In Cooley's *Briefs on Insurance,* Vol. 7, page 6048, the general rule is laid down as follows:

> "Under the principle that those defects upon which the company intends to rely must be pointed out, an objection to certain defects in the proofs will amount to a waiver of all of those not mentioned."

We respectfully submit that the defendant came belatedly before the court to contest the various items of loss set forth in the proof submitted to it, for its general objection certainly cannot be construed as a specific objection to each item as set forth in that document.

The statement from the case of *Lauman v. Concordia Insurance Co., supra,* which appears in italics in our previous quotation from it, was strictly speaking, not necessary for the decision in that case. Whether it is, nevertheless, sound law, is the question before this Honorable Court. Therefore it represents, in connection with this appeal, a matter of first impression. That it is of tremendous importance to the insurance business is obvious.

The reason why the language and reasoning of the cases to which we have referred on this point is sound may be readily seen in connection with this particular case. It would be entirely useless and would serve no purpose if, after an insured has gone to the trouble of specifically stating each item of loss, the insurer could then dispose of such a specific instrument by a general denial of liability. It is the apparent purpose of the provisions in question to clearly bring out the points of disagreement between the insurer and the insured, to determine as nearly as may be done the precise questions in dispute, and to reach at an early date an agreement as to all items concerning which there is no difference of opinion. That purpose is frustrated if the insurer is permitted to make a general denial of liability, and if he is then allowed, after his liability is established, to attack each item of the specific proof of loss separately, although he has made no specific objection thereto. According to the cases the legal rule should be that if the insurer denies liability, and if it should later be established judicially that he is liable under the policy,

he will not then be allowed to introduce evidence to vary, contradict, or attack the specific items of a proof of loss on which he could have manifested specific disagreements long before a lawsuit was ever filed.

That such a practice is especially desirable in a use and occupancy policy, where the accuracy of the proof of loss depends largely on the degree in which the plaintiff possesses the gift of prophecy, is evident from this case without further elaboration.

In the light of the foregoing the court was entitled to find that the loss sustained by plaintiff under Item I was, in the absence of specific objections to the various items involved, the sum of $22,974.94, and by the same token *the trial judge should have found for the plaintiff on Item II of the policy in the sum of $14,697.27, instead of cutting this latter figure in half.*

This failure of the trial court to find for the plaintiff in the full amount of $14,697.27 on Item II under the policy is the subject of plaintiff's cross-appeal, and in the light of the authorities cited it would follow that if the judge was compelled to find for the plaintiff in the full amount under Item I, according to the proof of loss he was similarly compelled to find for the plaintiff in the full amount under Item II. We respectfully request this court to consider this argument in connection with the cross-appeal of the plaintiff. We will, however, later point out that as an alternative proposition in support of our cross-appeal the trial judge was wrong both under the law and the evidence in arbitrarily cutting the figure $14,697.27 on Item II in half, or to reduce it in any amount.

That this issue was squarely presented to the court appears from the transcript of the pretrial proceedings

[Tr. p. 172], as well as from the remarks of the trial judge at the close of plaintiff's case in chief [Tr. p. 330], where the court said:

> "I think the record should also show that at the pretrial hearing it was the contention of the plaintiff that his proof of loss as submitted was conclusive as to the loss. In other words, that the plaintiff was not required to introduce any further evidence and it was not subject to dispute by the defendant; and that was submitted to the Court on briefs and the Court ruled against the plaintiff's contention and held that the plaintiff would be placed upon his proof to establish his loss. I think the record should show that, so that when this record goes before the Circuit Court the Court's ruling on that issue may be properly before the Circuit for decision."

(b) By Failing to Request an Appraisal of the Amount of Loss the Insurer Waived His Right to Object to the Amount of Loss Claimed in the Proof of Loss.

The defendant should be held in default under the policy with respect to the method it pursued in connection with the proof of loss in still another respect. Attention of this court is called to the provisions of the policy appearing on page 19 of the transcript, in which it is stated:

> "It is a condition of this insurance that in case the insured and this Company are unable to agree as to the time necessary to rebuild, repair or replace the described property, and/or the value of the subject of this insurance, and/or the amount of loss thereon the same shall be determined by appraisal in the manner provided by this policy, the provisions of which policy shall govern in all matters pertaining to this insurance except as herein otherwise provided."

There is no contention whatever on the part of the defendant that the plant could have been restored in a shorter period of time than the plaintiff took therefor, but the crux of the entire litigation is the amount of damage sustained by the plaintiff on account of the loss of profits. Since defendant so violently and totally disagreed with plaintiff on this score, it was clearly required, under those portions of the policy which we have just quoted, to take the necessary steps to see that

> "the amount of loss thereon . . . *shall* be determined by appraisal in the manner provided by this policy." (Italics ours.) [Tr. p. 34.]

The record is silent as to any attempt on the part of the defendant to follow this provision of the policy, and the fact moreover is that no attempt whatsoever was made to comply with the provisions to which we have just referred. [Tr. p. 235.]

The provisions of the policy with respect to the method by which the appraisal is obtained are contained in the following language:

> "If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is disagreement and shall name a competent and disinterested appraiser. . . ." [Tr. p. 34.]

It will be seen from this language, as well as from the clause previously quoted, that the obtaining of an appraisal is made mandatory by the policy inasmuch as it is uniformly held that the word "shall" means or is synonymous with "must." Not only are the provisions manda-

tory, but they are unilateral, since the initiative to obtain an appraisal rests squarely on the shoulders of the insurance company.

It will, of course, be contended by the defendant, in accordance with its position at the time of the pretrial and trial, that these provisions for appraisal are contained in that portion of the policy which embodies the provisions of the standard fire insurance policy adopted by the legislature of the State of California, that these provisions apply, therefore, to fire insurance, but not to the use and occupancy policy to which they are attached.

That this contention is not tenable appears from the following provisions of the policy itself. It is stated in section 13 of the use and occupancy endorsement that the amount of the loss

> "shall be determined by an appraisal in the manner provided by this policy, the provisions of which policy shall govern in all matters pertaining to this insurance, except as herein otherwise provided."

On the first page of the use and occupancy form the following language is used:

> "Loss, if any, subject, however, to all the terms and conditions of this policy, payable to the insured."

When the use and occupancy form was attached to the standard form of fire insurance policy, the parties obviously must have meant that the document as thereafter constituted should be considered as one policy of insurance, and that all provisions of the entire instrument should form one contract.

This being so, it follows that none of its clauses may be deemed to be superfluous or useless. On the contrary,

it must have been the intention of the parties to consider the provisions of the standard form of fire insurance contract as a material part of the use and occupancy endorsement.

Defendant will further contend, as it did in connection with the pretrial of this cause, that the appraisal provisions of the policy are void and against public policy in that they divest the courts of jurisdiction. There are two conclusive answers to that. First, in California, where this contract was made, arbitration provisions are not against public policy as long as they are not absolute and do not constitute an agreement not to resort to litigation at all. Secondly, the appraisal provisions under consideration are not in the nature of arbitration provisions; they are the result of legislative enactment. (See *Cal. Ins. Code,* sec. 2071.)

The mechanics of adjustment, as provided by the policy, are simple and purposeful. The legislature had a definite end in view when it provided therefor in the standard form. All of them have one aim, to define and narrow the matters in dispute.

FIRST: The insured must furnish a proof of loss.

SECOND: If that proof of loss is defective, the insurer may ask for verified amendments.

THIRD: Within a specified time after the amendments are furnished the insurer may file objections to the items contained in the proof of loss.

FOURTH: As to those items of loss to which the insurer objects, he must "forthwith" ask an appraisal, so that only those items need be litigated on which there is an honest disagreement after the appraisal method has been exhausted.

Clearly, the legislature interceded to avoid the necessity on the part of the court of turning auditor and of deciding which of several conflicting sets of figures is based on the proper method of computation.

Defendant, by following none of these prescribed steps-- yet admitting some loss under its own alternative theories —should not be allowed now to place the task of auditor in the lap of the trial court, but should be bound by the figures to which it did not specifically object.

The requirement of an adjustment of accounts by appraisal in the case of insurance losses has been repeatedly held in California to be a condition precedent to the bringing of an action on the policy. We refer to the following cases:

> "In the case at bar, by express provision of the policy, the defendant's stock and funds are made liable, 'subject always to the conditions and stipulations endorsed hereon,' etc. Referring to the conditions and stipulations which qualify the general promise to pay in case of loss, we find: The defendant was not bound to pay until the declaration or affirmation, account and evidence therein provided for, should be produced. That on proof of loss *and adjustment of accounts,* the company was bound to pay immediately, or, at its option, to rebuild; and that, in case of difference of opinion as to the *amount* of loss or damage, such difference should be submitted to the judgment of two disinterested and competent men, mutually chosen, etc.
>
> "We think the language of the stipulation brings this case within the principle laid down in the English case above referred to; that it is the clear meaning of the contract that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration

therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose."

Sauselito L. & D. D. Co. v. The Commercial Union Assur. Co., 66 Cal. Rep. 253, at p. 258.

" 'It is further expressly covenanted by the parties hereto that no suit or action for the recovery of any claim by virtue of this policy shall be sustained in any court until after an award shall have been demanded and obtained, fixing the amount of such claim in the manner above provided.'

"The language of the stipulations brings the case within the principle of the case of *Old Sauselito Land & D. D. Co. v. Commercial Union A. Co.,* 66 Cal. 253, and of the cases there cited, on the authority of which the judgment and order in the present case must be reversed. Here, as it was in the Sauselito case, the clear meaning of the contract is, that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose."

Adams v. South British and Natl. Fire Ins. Cos. of New Zealand, 70 Cal. 198, at p. 201.

It is respectfully submitted, then, that the trial court was correct under the principles herein discussed to fix plaintiff's loss under Item I in the amount of $22,974.94, and that the judgment as to the first item should be affirmed and under our cross-appeal the judgment as to the second item should be reversed, with directions to the lower court to increase the total judgment by the sum of one-half of the second item, or $7,348.64.

II.

The Trial Court's Finding That the Plaintiff Sustained Damages in the Sum of $22,974.94 Is Sustained by the Evidence and in Reaching That Figure the Court Applied the Proper Measure of Damages Under Item I of the Use and Occupancy Policy.

The second point is concerned only with the propriety of the court's finding that under Item I of the use and occupancy policy plaintiff sustained a loss of $22,974.94.

Under Point I we have shown that, considering the legal principles applicable to plaintiff's detailed proof of loss and defendant's failure to object thereto specifically, this figure of $22,974.94 must be deemed to have been established. We shall show under this point that considering only the evidence and disregarding the matters discussed under Point I, a finding that plaintiff was damaged under Item I of the policy in the sum of $22,974.94 is proper and fully supported by the record.

Item I of the policy reads:

> ". . . This company shall be liable under this policy for the actual loss sustained by reason of such suspension, consisting of:
>
> 1. The net profits on the business which is thereby prevented."

To arrive at this figure of loss, the policy lays down the measuring stick [Tr. p. 16]:

> "In determining the amount of net profits . . . for the purpose of ascertaining the amount of loss sustained . . . due consideration shall be given to the experience of the business before the fire and the probable experience thereafter."

It is obvious that some measure of prophecy or speculation is required on the part of the finder of facts to determine the amount of loss, and that it is not ascertainable by any formula of exact mathematical computation prescribed in the terms of the policy. As the trial court so aptly put it in its memorandum opinion, it was required to determine "what would have happened if nothing had happened."

In conformity with the above quotations from the policy, and basing the testimony on the previous earning records of the plaintiff company, plaintiff offers a simple method of computation. The average monthly earning record over the period of eight months prior to the fire—the total period of time during which plaintiff operated, being a newly founded concern—was arrived at by plaintiff's auditor and multiplied by three, representing the three months during which operations were suspended because of the fire. To that figure the auditor added 10 per cent, which he justified by pointing out that the volume of plaintiff's sales had increased constantly over the period of the preceding eight months, and that it was natural to expect that it would so continue to increase. In fact, when plaintiff, during the suspension period, purchased gasoline to fulfil its commitments and to prevent its sales organization and its good will from going into a slump, the company's experience showed an increase of sales during that period. To the figure thus established plaintiff's auditor added $3901.15, which he estimated to be plaintiff's loss of net profits on its polymerization unit which was under construction at the time of the fire. Concerning the propriety of including this figure in the loss sustained under Item I, we shall say more when we reply to appellant's special point devoted to this question.

This method of arriving at plaintiff's loss is natural, simple, in accordance with ordinary business experience, and certainly, as the trial court found, in accordance with the intention of the parties. As his memorandum denying a new trial says, this interpretation is "in conformity with the terms of the policy." The trial court not only adopted this method of calculation as being the one contemplated by the policy and by the intention of the contracting parties, but in connection with it he also accepted the figures of plaintiff's auditor on the loss under Item I as they were reflected both in the preliminary proof of loss [especially Tr. pp. 66 and 67] and later on in the auditor's testimony, which we shall not summarize in detail.

In view of its role as finder of facts, the court had the unquestioned duty to choose between the views of rival experts as well as between conflicting bases of adjustment. (*Hutchings v. Caledonia Fire Ins. Co.*, 52 F. (2d) 744.) His choice, according to well-established principles of appellate review, should not be upset unless there is no evidence whatever to sustain it. It would not be particularly charitable to defendant's expert to discuss at length the weaknesses of his testimony or to point out the arbitrary manner in which he eliminated obviously proper items from plaintiff's preliminary proof of loss. His cross-examination, however, makes interesting reading and shows that the trial court was fully justified in discrediting his testimony. [See especially Tr. pp. 363-371.]

Defendant's argument consists of a detailed re-examination of plaintiff's proof of loss. The argument in substance is that had the court taken any one of nine methods of calculation of which six are not based upon the previous earning record of the company over the period of eight months, the judgment would have been, depending

upon what method was adopted, either for the defendant or the sum awarded to the plaintiff would have been much smaller.

This argument could be considered only if the policy required as a matter of law, the adoption, as a basis of calculation, of some other criterion than the entire previous earning records of the company. This, however, we have seen, is not the case.

We shall not follow or analyze these nine alternative methods of defendant in detail. They constitute, however, one-half of its brief, extending from pages 34 to 65, the other half being taken up largely with a summary of the issues and preliminary matters. Some of these nine alternative ways, as we shall see, would allow plaintiff some damage, others would not allow the plaintiff any recovery.

What shall we say, then, of an insurance policy of which the one responsible for its language contends that *on the basis of one set of figures* furnished by the plaintiff it is susceptible in addition to the interpretation thereof furnished by the plaintiff *to nine different alternative* interpretations, or to nine different bases of figuring the loss? Or what shall we say of a defendant who maintains, after reading a policy subject to that many interpretations, that the court should choose precisely that interpretation which does not permit the plaintiff any recovery? Obviously, the law applicable to a policy of so confused a character is that the policy must be interpreted in the light most favorable to the assured.

> "It is to be remembered that contracts of this sort are to be interpreted in the light of the fact that they are drawn by insurance companies and are rarely, if

ever, understood by the people who pay the premiums. Every rational indulgence must be shown the assured."

Coniglio v. The Conn. Fire Ins. Co., 180 Cal. 596, at 599.

"Use and occupancy as terms of insurance may assume within their general scope the expectation of profits and earnings derivable from property; but the terms appear to have a broader significance as the subject of insurance and to apply to the status of the property and its continued availability to the owner for any purpose he may be able to devote it to. The defendant might have avoided all questions of contention and have made plain the subject of its insurance, if it were the business of the plaintiff, or its earnings and profits by the use of appropriate and unmistakable words, but such words occur nowhere. The defendant has chosen to make a contract of insurance which distinguishes its subject as something other than a building or machinery and which may mean the earnings of profits only by resorting to reasoning. The terms made use of have not the accepted significance contended for by the appellant and any doubt or ambiguity should be resolved against it and in favor of the assured."

Michael v. The Prussian Natl. Ins. Co., 171 N. Y. Rep. 25, at 35.

Let us, then, briefly reply to each of the nine methods of computation of plaintiff's loss which defendant suggests.

A.

Defendant's first alternative method is as follows: It says, We will grant plaintiff's figures and its earning record for eight months prior to the fire, but these figures do not take into consideration any depreciation for the previous eight months, whereas such is required in a use and occupancy policy under the case of *Fidelity Phoenix Ins. Co. v. Benedict Coal Corp.* (C. C. A. 4), 64 Fed. (2d) 347.

In this connection defendant makes reference on page 36 of its brief to a depreciation of $3034.93, but does not make clear the fact that plaintiff's proof of loss actually took into account that amount of depreciation. [Tr. p. 66.] Defendant says the amount of depreciation should have been the amount used by plaintiff in its income tax return, and the amount in the income tax return was $23,079.59. On the basis of such an allowance for depreciation, plaintiff would have made only an anticipated profit during the three months of suspension of $14,706.57. There are three conclusive answers to this contention:

First, the trial court as the finder of facts was not compelled to consider the larger amount of depreciation as the true one.

Second, not only as the finder of facts was the court entitled to consider the smaller sum as the true amount of depreciation, but also on the basis of decided cases the figures given by plaintiff in its income tax return as depreciation were not binding upon the trial court. The

trial court considered this argument and in its memorandum opinion disposed of it in this fashion [Tr. pp. 135, 136]:

> "This is not a new argument and in at least two use and occupancy policy cases, the courts have held contrary to defendant's contention.
>
> "In Puget Sound Lumber Co. v. Mechanics' & Traders Ins. Co., 168 Wash. 47; 10 Pac. (2d) 568, the court said: 'In such an action as this, the question is, not in what account did the insured place certain items of receipt or disbursement, of depreciation, or of profit or loss, *for the purpose of computing any income tax* which might be due for the purpose of making a statement for its banker, but rather to what account should the respective items be allocated for the purpose of determining liability, if any, upon the policies sued upon.' (Italics supplied.)
>
> "In Fidelity-Phenix Ins. Co. v. Benedict Coal Corp., 64 Fed. (2d) 347, 352 (4th Circ.), cert. denied 289 U. S. 762, the following language is used: '* * * We think it clear that such *losses are to be determined in a practical way,* having regard to the experience of the business before the fire and its probable experience thereafter, *without being confined to the basis upon which books are kept for income tax purposes* or for dealings with stockholders.' (Italics supplied.)
>
> "Upon the foregoing authorities I hold that this court is not bound by the amount charged off by the plaintiff for income tax purposes."

Third, the case of *Fidelity-Phenix Insurance Company v. Benedict Coal Corp.* (C. C. A. 4), 64 Fed. (2d) 347, is not authority for defendant's contention that the amount

of depreciation shown in the income tax return must be considered in arriving at the true amount of loss. At page 353 of that opinion, to which defendant refers, the court merely says:

> "And we agree with the learned judge in his dealing with depreciation and depletion under the heading of fixed charges. Depreciation on property which has been destroyed is not to be allowed as a fixed charge, even though it must be considered in estimating profits which would have been earned if the business had gone on; for manifestly property which has been destroyed cannot depreciate."

Defendant's argument on this first alternative method, therefore, does not show that there was error in the method of dealing with depreciation which was adopted by the trial court.

B.

But defendant says, Let us not take the entire eight months of plaintiff's previous experience of the business into account. Let us take only the three months immediately preceding the fire, because during those three months there was a distinct change in the market. Plaintiff got less for his gasoline, and under that system of computation, without considering depreciation, plaintiff would have made only a total of $12,476.60 of profit. Whereas, taking into consideration the depreciation reflected in plaintiff's income tax return, plaintiff would have suffered a loss during that period.

We are not told why, under the policy, the experience of the last three months immediately preceding the fire should be used. If the defendant, being responsible for the drawing of the policy, should have desired to make the

last three months the basis, it would have been very simple for it to say, instead of, "Due consideration shall be given to the experience of the business before the fire," the following: "Due consideration shall be given to the experience of the business *three months* before the fire."

In this connection, defendant does not mention that the drop in the profits during the last three months was explained by the plaintiff to be due to irregularity in manufacture and to the installation of improvements requiring a suspension of refining operations for various periods of time, which improvements, however, were calculated to increase the output and the profit in the future. [Tr. p. 338.]

Nor is the argument that the sales price per gallon obtained by plaintiff indicates a smaller profit at all valid, because, as the trial judge also said, that argument does not take into consideration the cost of manufacturing.

Defendant, moreover, misinterprets Exhibit 7 [Tr. p. 124] when it suggests that during the suspension period the average cost of manufacture would have been the same as during the eight months immediately preceding the fire. Plaintiff's Exhibit 7 was a computation furnished for the benefit of the trial court, and in no way intends to give actual average cost of production during suspension. What the average cost of production would have been during the three months of suspension was not gone into during the trial. It is seen, then, that defendant's second alternative method of computing the loss is based on fallacious reasoning and the method itself is not based on the language of the policy.

C.

The next method defendant suggests is that what should be taken into account is the month immediately preceding and immediately following the fire.

The policy, as we have seen, says that the experience of the business "before the fire and the probable experience thereafter" should be considered. It does not say—and if the defendant had desired this result, it would have been easy to so provide—"due consideration shall be given to the experience of the business one month before and one month after the fire."

This method, defendant contends, shows the great disproportion of the average monthly profits during the suspension period as compared with August and December, since the average profits for the suspension period, as found by the court, are claimed to be nineteen times as great as the company's average profit for August and December, if the income tax depreciation is not taken into account; and if the income tax depreciation is taken into account, the discrepancy is still greater.

A better indirect argument for the fallacy of defendant's contention could not be made than what defendant itself has said in this connection. Would a reasonable business man buy a policy from an insurance company, the recovery of which would depend on the experience of just one month prior to and after the happening of the fire? If defendant contends that the fluctuation of nineteen times the profit of another month is unusual in the short experience of the plaintiff, it need look only at its own Appendix 1 where it appears—if we may be as arbitrary in our selection as the defendant—that the profit in May was thirty times as large as in August, and in February, March

and April approximately twenty times as great. Defendant's third method, therefore, is also entirely fallacious and in direct contravention of the policy as well as of the natural expectancy of a person purchasing the type of policy here involved.

D, E, F.

Defendant next tries a new attack, and says if the amount of loss is determined on the basis of the cost of gasoline to the plaintiff, it would have sustained a loss whether the eight months preceding the fire are taken as a basis, or the three months preceding the fire, or the month immediately preceding and immediately following the fire.

It is obvious that that proposition is utterly untenable, because the policy provides that in determining the loss the experience *of the business* shall be taken into consideration, *not the cost of manufacturing gasoline* to the plaintiff. Certainly, that cost of manufacturing is not the only source of loss to the plaintiff during a suspension during which he operates with a top-heavy sales organization. Here again defendant's computations are based on the average cost for eight months of all gasoline manufactured and purchased, which figure does not take into consideration, as the trial court points out and as we also pointed out previously, the fluctuation in the cost of raw materials and manufacturing. Neither of these three methods, therefore, is the proper one to be used in arriving at plaintiff's loss.

G, H, I.

The final method suggested by the defendant as the proper one is taking into account plaintiff's alleged actual experience after the fire. At least his heading would indi-

cate that method, although the tables which follow (O. Br. pp. 50, 54, 56, 57) do not carry out that scheme. This argument, in all its ramifications, becomes progressively more difficult to follow. It is built around the proposition that plaintiff sustained an admitted loss during the suspension period of $32,975.68, which loss results largely by reason of the plaintiff going into the open market to purchase sufficient gasoline to fulfil its commitments. Now, defendant argues, had plaintiff not purchased any gasoline but had it been able to manufacture the same during the suspension period, it would not have saved enough from the manufacture to convert the loss of $32,975.68 into a profit. Defendant further maintains that before as well as after the fire plaintiff purchased a percentage of its gasoline in the open market and used it in connection with its sales activities. Defendant then says that plaintiff could not have converted its actual losses for the suspension period into a profit, even if it had manufactured gasoline, and that is so whether we use the average percentage of manufactured gasoline for the three months immediately preceding the fire or whether we use the percentage of gasoline manufactured during August before and December after the fire or whether we use the percentage of gasoline manufactured only during December, or even though we use as a basis the percentage of gasoline manufactured by the plaintiff during all of the eight months preceding the fire.

The inescapable corollary of this argument is that plaintiff would have been smarter if it had utterly suspended its operations during the reconstruction period; or, in other words, that it had no business of going into the open market to purchase sufficient gasoline to fulfil its commitments.

The first error in defendant's assumptions is that defendant again misconstrues the meaning of Plaintiff's Exhibit 7. The average manufacturing cost for September, October and November, as given there, is the average of the previous eight months and does not take into consideration fluctuation in the price of raw materials, fluctuation in the price of labor, the expense of a top-heavy organization lying partly idle by reason of the fire, and many other factors. Had the plaintiff actually manufactured gasoline during September, October and November, the average manufacturing cost might have well turned out to be different than the one given in the exhibit, to wit, .04608 per gallon.

Moreover, defendant does not take into account the fact that had plaintiff been utterly idle during the suspension period, the loss would have been immeasurably greater than the actual operating loss sustained during the suspension period. [Tr. p. 212.] In fact, a cessation of business for a period of three months would probably have resulted in the ruination of the business and good will which plaintiff had built up in its products during the eight months of its existence.

Finally, the policy does not warrant the strained method of computation which defendant has adopted, but on the contrary demands in express terms that during the suspension period the insured must

> "make use of other property, if obtainable, if by so doing the amount of loss hereunder will be reduced, and in the event of the loss being so reduced such reduction shall be taken into account in arriving at the amount of loss hereunder" (paragraph 18),

and the policy further provides:

> "Nevertheless this company shall be liable for such expenses as may be incurred for the purpose of reducing any loss under this policy, not exceeding, however, the amount in which the loss is so reduced."

In accordance with these provisions defendant's adjusting representative, Mr. DeCamp, told plaintiff to proceed to purchase gasoline and attempt thereby to minimize the loss, if possible. The testimony to that effect is undisputed. [Tr. pp. 209-211.] Surely, plaintiff cannot now be penalized when it followed the explicit instructions of defendant.

Therefore, if the insured, not content to suffer a total loss of its business, goes out in an honest attempt and in compliance with the provisions of the policy, to minimize that loss, clearly it is utter fallacy on the part of the insurance company to maintain that had the plaintiff operated during the suspension period it would have sustained a loss anyway, and that therefore it should not be entitled to any recovery.

It follows that the only fair, reasonable and equitable method of ascertaining the loss, and the one contemplated by the policy, is the one which bases the amount of the loss upon the previous earning records of the company; not the earning records of a selected series of months, but upon the entire experience of the plaintiff during its eight months of existence.

III.

Plaintiff Was Entitled to Include in Its Computation of Loss, the Prospective Profits of the Polymerization Unit.

The last point of defendant's brief is devoted to a discussion of the $3901.15 prospective profit on account of the polymerization unit. This profit, defendant maintains, is not allowable. In support of its claim it relies on *Fidelity-Phenix Fire Insurance Co. v. Benedict Coal Co.*, 64 Fed. (2d) 347. In that case, defendant says, the insured had decided to close down operations in seam No. 10 of its mine. A fire, however, which broke out soon afterwards saved them the trouble of carrying out their intention. The insurance company argued that inasmuch as the seam would have ceased to operate anyway, even if no fire had occurred, the use and occupancy policy should not be deemed to include this loss. This contention was overruled by the trial court and by the Circuit Court of Appeals.

How the defendant, on the basis of this case, can argue that if you are entitled to compensation for the loss of profits from a structure which you intended to close anyway, it necessarily follows that you should not be compensated for loss from a contemplated structure, the opening of which was prevented by the fire, is difficult to see. By logic the opposite conclusion is required. If you can be compensated for the loss from a structure, even though you intended to close it, *you should be all the more compensated* for the loss of profits from a structure

which you could have opened had it not been for the fire. The *Fidelity* case is, in effect, authority for our contention. If the polymerization unit would have been erected and would have shown a profit, then plaintiff is entitled to be compensated for the loss of that anticipated profit. That is one of the risks insured against. Defendant could have defeated this claim of anticipated profits only by showing that the unit would not have been a profitable venture. This the defendant did not do. On the other hand, the examination of the president of the company, Mr. Devere, showed positively that the operation of the unit was profitable and that the amount set up in the proof of loss on account of possible profits is a reasonable amount for 55 days of the period of suspension [Tr. pp. 116, 201-203]—during which time the polymerization unit would have been in operation had it not been for the fire [Tr. p. 202]—and was based upon the experience of the company. [Tr. p. 203.]

We submit, therefore, that the figure of $3901.15 is justified by the evidence, and that the trial court properly took that amount into consideration in arriving at the total loss of plaintiff under Item I of the policy.

IV.

The Court Should Not Have Cut Plaintiff's Claimed Loss on Account of Fixed Charges in Half, and the Existing Judgment for Plaintiff Should be Increased by $7,348.63.

This point is concerned only with the propriety of the court's finding that under Item II of the use and occupancy policy the plaintiff did not sustain a loss of $14,-697. 27 but that half of that figure, to wit, $7348.64 is the proper amount of loss under this item.

Under point I we have shown that according to the legal principles applicable to plaintiff's detailed proof of loss and defendant's failure to object specifically thereto, the loss under Item II became definitely established at this sum of $14,697.27. We shall show under this point that independent of the argument under point I, the finding that plaintiff's damage under Item II was only $7348.64 is contrary to the evidence as well as the legal effect of the policy and that, consequently, plaintiff's contention on its cross-appeal should be sustained and that the judgment of the trial court should be increased by the sum of $7348.63.

Item II of the policy undertakes to compensate the plaintiff for

> "fixed charges and expenses, only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives, and of employees under contract, taxes, interest, rents, royalties, insurance premiums, advertising, special contracts, dues, subscriptions, directors' fees, accounting expense, legal expenses and fees, all other fixed charges and expenses . . ." [Tr. pp. 13-14.]

Plaintiff's witnesses testified at length with respect to the amounts paid on account of Item II at the following places in the transcript [Tr. pp. 241*ff.*, 278*ff.*, 285*ff.*, 306*ff.*, 332*ff.*, and 371*ff.*].

Without troubling the court with a summary of this evidence, we shall state generally that the actual amount paid out on account of Item II were larger than the estimates thereof in the proof of loss. During the suspension period they amounted to $20,832.92. [See Tr. pp. 332-333.] The estimate thereof given in the preliminary proof of loss [p. 67] is considerably lower, amounting to $14,697.27. The individual items on which this total estimate of $14,697.27 is based, are listed following page 73 of the transcript, where they appear intermixed with other non-fixed expenditures.

The trial court was of the opinion—and there is evidence to support his view—that some of the indispensable employees of the refining unit were used during the suspension period in plaintiff's sales organization, which continued operating during the suspension period. It does not appear, nor would it be possible to say from the figures in the transcript, what employees of the refining unit were made use of in the sales organization, nor is there any testimony in the record by which the value of such services to the sales organization, whether full or part time, could be ascertained. In spite of that fact the trial judge was not warranted in cutting the fixed expenses under Item II in half. If it intended to do any cutting it would have been more equitable to cut the actual expenditures for fixed charges for the period of suspension in half which, as we just stated was $20,832.92, and not the estimated figure.

It was right, however, to disregard totally defendant's view and version of the fixed expenses. Under defendant's testimony these fixed expenses were, however, at least $5801.25 or, based on a different starting point of computation, as much as $6198.20. [Tr. p. 358.]

Defendant, by the way, offers no explanation why it did not admit as much in response to plaintiff's proof of loss. It had all the figures available and could have narrowed the issues by that much. It did not do so. This shows clearly the prejudicial nature of its conduct in making a general denial of all items of loss claimed by the plaintiff. The figures just given were just as available to the defendant at the time it wrote the letter denying liability [Tr. p. 114] as they were at the time of trial. These items defendant was bound in good faith, and in order to facilitate the adjudgment of the loss, to admit. But it did not do so.

But defendant's expert testimony was for good reasons rejected by the trial court. Its expert nevertheless admitted that depreciation constitutes a proper item of fixed charges. [Tr. pp. 368-369.] Therefore under defendant's own accounting views 3/8 of $23,079.59, or $8653.20, should have been added to the fixed charges under Item II. This would bring the total of Item II under defendant's own testimony, to at least $14,454.45. Plaintiff, of course, does not claim the benefit of this computation in connection with the fixed charges because it has already had the benefit of this figure by reason of not taking the full amount of depreciation into account in its computations of prospective profits under Item I of the policy. The propriety of disregarding large items of depreciation, it will be remembered, was explained in point II, subsection b of this brief.

While defendant, then, admitted that there were fixed charges in at least the sum of $5801.25 and possibly in the amount of $6198.20, defendant's expert William F. Maloney arrived at these figures by arbitrarily decimating the figures given in the schedules attached to plaintiff's proof of loss and in plaintiff's books. For instance, he arbitrarily eliminated the executive salary of Mr. Brownell from the fixed charges [Tr. p. 363], he eliminated the item for dues and subscriptions, for fixed overhead, for legal and professional services [Tr. p. 365], although the policy expressly provides for them. [Tr. p. 366.] He included no items for salaries for the men in the manufacturing plant, and no light or power expense [Tr. p. 368], so that defendant's testimony with respect to the proper amount of fixed overhead and charges is utterly worthless.

Was the trial judge right in concluding that since some of plaintiff's employees continued to serve in the sales unit he was entitled to cut Item II in half? Surely not!

It is admitted that during the suspension period plaintiff, in an attempt to minimize its loss, incurred an operating loss in excess of $32,000. In spite of the fact, then, that some of plaintiff's employees from the manufacturing plant may have been used partly in connection with the sales organization, the fact remains that the payment of these salaries in connection with the sales organization was nevertheless an entire loss to the plaintiff. It did not even earn its fixed charges during that time, although it did precisely what the policy and the adjuster required. Therefore no benefit accrued to the plaintiff by reason of its permitting some of its employees from the manufacturing end of the business to participate in the sales work. On the contrary, the benefit accrued to the insurance

company. Plaintiff could have permitted these few employees to be idle, thus increasing the operating loss that much more. Therefore, the court proceeded on the wrong premise when it assumed that it was entitled to cut the amount of loss under Item II in half. The theory of plaintiff in this respect is well expressed in the following statement by Mr. Penney on behalf of plaintiff during the trial [Tr. p. 245], as follows:

> "Your Honor, under the policy here, if we were earning that before and we attempted to carry on the business afterwards, and we didn't earn it in the sales or in the conduct of the business following the fire, then under the terms and conditions of the policy we are entitled to be reimbursed for that. For instance, if we have an organization here in which we are actually earning $15,000 a month and paying those employees, and this fire comes along and we attempt to minimize our loss and we don't actually make the salaries of those employees, under the terms and conditions of this policy we are entitled to reimbursement, because the only thing we are doing is trying to minimize our loss, but we are not to be penalized by virtue of the fact that we are attempting to minimize it."

It is respectfully submitted, therefore, that the plaintiff was entitled to a full allowance under the policy in Item II on account of overhead and fixed charges, and that the trial judge was in error in cutting that figure in half. The judgment on Item II should have been in the sum of $14,697.27.

V.

Reply to Defendant's Contention A. That the Complaint Fails to State a Cause of Action; B. That the Findings of Fact Do Not Support the Judgment; and C. That the Plaintiff Did Not Sustain the Burden of Proof.

A. The Complaint States a Cause of Action.

We submit that the complaint conforms to the rules of Civil procedure for the district courts of the United States, especially 8, subdivision *a*, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief," and with subdivision e(1), "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

Whatever defect, if any, the pleading may have, defendant does not deny that there is a finding by the trial court that the plaintiff sustained a "loss of profits." We have shown that this finding, along with all others, is amply supported by the evidence.

Therefore, the provisions of Rule 15, subdivision *b* apply, which say:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*" (Italics ours.)

The rule then provides a mechanism by which the pleadings may be amended *in the event there is a motion to that effect during the trial* that the evidence is not within the issues. No such motion appears anywhere in the record, and the outcome of the trial, if otherwise correct, cannot now be affected by defendant's technical contention.

B. The Findings of Fact Support the Judgment.

The findings of fact must be liberally construed in support of the judgment. We submit that the findings do not need to follow the wording of the policy verbatim and that the court's language which follows is a sufficient finding that there was a loss of profits [Tr. p. 145]:

> "The court finds that as a result of the fire of August 30, 1940, the loss to the plaintiff of profits which would have been earned amounted to $22,-974.94; that the loss to the plaintiff of fixed charges and expenses which would have been earned amounted to $7,348.63, making a total loss of $30,323.57."

When this language is read in connection with paragraph V, in which it is said that the plaintiff was deprived of the use and occupancy of the property and its normal business suspended for a period of 91 days [Tr. p. 142], and when the findings of fact are read as a whole, it appears that they do support the judgment.

C. Plaintiff Did Sustain Its Burden of Proof.

It is unquestionably correct that the plaintiff had the burden of proof in this litigation, but after the lengthy discussion which we have already indulged in, we feel that it would be superrogation to try to point out again in detail that the preponderance of the evidence was clearly susceptible to the findings which the trial court placed on it.

We submit that it was clearly shown that the operation of the sales organization and of the manufacturing organigation were interdependent and that the sales organization was adversely affected by the fact that it could not be supplied with gasoline manufactured by the refining department.

There certainly is no requirement in the policy that the plaintiff had to show the probable experience of its business for twelve months immediately succeeding the fire. The fact is, and plaintiff's brief itself reflects it, that the experience of the business after the fire, at least for the month of December after the fire, was discussed. [Tr. p. 348.] Plaintiff's president pointed out that plaintiff's experience in December was not typical and that the operation of the reconstituted plant was beset with numerous difficulties which justified the trial court in not paying any greater attention to the experience of the business after the reopening of the plant than it did.

Conclusion.

In conclusion we respectfully urge this Honorable Court to affirm the trial court in its conclusion under Item I of the policy. It expressly found that the business of plaintiff was prevented by the fire would have resulted in a profit of $22,974.94 [Tr. p. 138], and this finding is amply supported by evidence.

But we urge the reversal of the trial court's action under Item II of the policy. Here plaintiff's recovery should be increased $7,348.63, and the total judgment should be $37,672.20 plus interest from March 11, 1941, at the legal rate.

Respectfully submitted,

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Attorneys for Plaintiff.

No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee,

CLOSING BRIEF OF APPELLANT AND CROSS-APPELLEE, GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION.

FILED

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No. 10494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a Corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellee,

CLOSING BRIEF OF APPELLANT AND CROSS-APPELLEE, GENERAL INSURANCE COMPANY OF AMERICA, A CORPORATION.

I.

Statement of Facts.

Under the heading "Statement of the Case," appellee and cross-appellant (hereinafter for clarity called plaintiff), states, page 2, "The appeal and cross-appeal involve the interpretation of a use and occupancy policy. . . ."

No question whatever of the interpretation of the policy arises in connection with the appeal taken by the defendant. The interpretation of the policy was stipulated to, namely, that the plaintiff could only recover if it would have made a profit had there been no fire.

Nowhere in plaintiff's brief does it dispute in the slightest any statement of fact or figures set forth in our opening brief. Plaintiff could hardly do so since they are all established by its own witnesses and books. Nowhere does plaintiff dispute that if any basis is to be taken except the over-all experience taken as a whole, of the entire eight months preceding the fire, the evidence shows that the plaintiff would have operated at a substantial loss for the suspension period.

II.

Reply to Plaintiff's Answer to Our Opening Brief.

1.

Preliminary.

Plaintiff quotes, page 18, a portion of the policy which provides that

> "*due* consideration shall be given to the experience of the business before the fire *and the probable experience thereafter,*" (italics ours).

We contend that if a marked change in market conditions occurred during the experience before the fire, *due* consideration requires a consideration of this fact. We contend that experience, that is actual receipts and costs after the fire, should also be taken into consideration.

On page 20 plaintiff says that the cross-examination of defendant's accountant shows weakness in his testimony. This we deny. However that may be, our opening brief is based *solely* on the evidence of plaintiff's books and its own witnesses.

On page 21 plaintiff says we contend that the policy was subject to nine separate *interpretations*. Of course, this is not so. The policy was susceptible of one and only one construction, and that construction was stipulated to. We suggested that there were nine methods of ascertaining the *fact* as to whether the plaintiff would have made a profit or sustained a loss during the suspension period. This has nothing to do with policy interpretation. We might also point out that while we suggested these nine methods of ascertaining the fact, we also stated that we believed only one of these was the correct method (Op. Br. p. 35), namely, the ascertaining of the actual extra cost to the plaintiff of purchasing rather than manufacturing gasoline and a comparison of this extra cost with the admitted loss sustained by the plaintiff. If the extra cost exceeded the actual loss, then plaintiff would have made a profit had it not sustained this extra cost. If the extra cost was not as great as the actual loss, as was the fact, then even had that extra cost not been incurred, plaintiff would still have operated at a loss.

2.

Plaintiff's Sub-heading "A", Pages 23-25.

Plaintiff says that the proof of loss did take into consideration a depreciation of $3,034.93. It is true that it does do so in one place [Tr. p. 66], but this depreciation is not carried forward into the summary of operations found on Tr. p. 68, nor does plaintiff's auditor refer to it in his testimony. [Tr. pp. 205-208, 238.]

Plaintiff says that depreciation as used in its income tax returns is not conclusive against it. We may concede this, but plaintiff omits to mention that both plaintiff's president, Mr. De Vere, and its auditor testified that the depreciation as set forth in these income tax returns was substantially the same amount as would have been arrived

at in the ordinary way of figuring depreciation, that is a comparison of the cost of the equipment as compared with its estimated useful life. [Tr. pp. 218-219, 299-303.] Depreciation in the total sum of $23,079.59 is established not merely by the income tax returns but also by this testimony of both the plaintiff's own witnesses.

Mr. De Vere did say on direct examination at one place that "we felt" that the item of $3034.99 reflected the true depreciation. [Tr. pp. 208-209.] This is not testimony that it *was* the true depreciation. In this connection we again call the Court's attention to the many inaccuracies in Mr. De Vere's much more positive statements than mere expression of "feeling". (See Op. Br. pp. 10-13.) However, even if Mr. De Vere's testimony as to his "feeling" otherwise had any weight, it would be entirely eliminated by his later testimony on cross-examination above referred to, as to the basis of arriving at the depreciation set forth in the tax returns.

The cardinal fact remains that even plaintiff does not dispute that if depreciation arrived at, not by a mere "feeling," but by the ordinary and logical method of calculating it is to be considered, then under any theory the amount awarded by the trial court is excessive.

3.

Plaintiff's Sub-heading "B", Pages 25-26.

This is taking the preceding three months as the basis.

Plaintiff says, pages 25-26, that if these three months were to be taken into consideration the policy should so read. This might be true were we contending that the three months period was an arbitrary one to be used in all cases. This is not our contention, which simply is that an event happened to occur, namely, the gasoline war and consequent break in prices, at the end of the first five months, which event rendered the experience before that

time entirely useless as a basis for computing what would happen thereafter and while the break in prices continued. It is this event and not a policy provision which makes the difference between the first five months and the three months of the suspension period.

Had the fire occurred early in the year or had market conditions continued as they existed when the policy was written, the fire would have caused plaintiff a loss of profits and it would have received payment under the policy. It was this break in the market and the continued drop in prices thereafter *and not the fire* which rendered it impossible for plaintiff to operate at a profit.

Plaintiff at a time when market conditions were favorable bought and paid for insurance merely upon its profits. It did not buy from or pay defendant for insurance against loss generally. Had plaintiff desired the coverage for actual loss when conditions changed so as to reduce or eliminate its prospects for making profits, it should have applied therefore and paid the much higher premium charged for a policy covering this enlarged risk.

Plaintiff says, p. 26, that we do not mention that the drop in profits during the last three months before the fire was explained by plaintiff to be due to irregularity in manufacture and in installation of improvements. Actually the testimony referred to in support of this statement is only with regard to the months of June and not to the entire three months [Tr. p. 338], and profits in August were much lower than those of June. However, a comparison of sales prices and profits, as shown on the charts, Defendant's Exhibits B, C and D, clearly and conclusively show that the controlling factor determining profits was the price obtained and that profits varied directly as did such prices, a fact which anyway is so obvious and well known as not to require the substantiation of the actual figures shown on the charts.

Plaintiff says, page 26, that the argument that the price per gallon obtained by plaintiff indicates a smaller profit, is not valid because it does not take into consideration the cost of manufacturing. Of course we *did* take into consideration the cost of manufacturing, which plaintiff's own evidence shows to have remained practically constant before and after the break in prices. Before the break, the average cost of manufacture per gallon was 4.605 cents and for the three months after the break it was 4.613 cents. [Appendix 2, Op. Br.] The difference of .008 of a cent would only amount to the sum of $80.00 upon one million gallons of gasoline manufactured.

Plaintiff now says that its own Exhibit 7 was not intended to give the estimated average cost of manufacturing during the suspension period. This is a new claim. Certainly it expressly sets it forth, and certainly it was so considered by the parties and the court, both at the trial and upon the motion for new trial. It is plaintiff's own express estimate on the point, and is the only evidence thereon. Plaintiff may not now like it, but that does not destroy its effect as evidence.

4.

Plaintiff's Sub-heading "C", Pages 27-28.

If plaintiff's *Actual* experience shows that the profit for the months immediately preceding and following the fire was only 1/30th of its profit for May and 1/20th of its profit for March and April, as plaintiff says is the case (pp. 27-28), this would seem to be conclusive that the experience of March, April and May furnishes no criterium of what would have happened between these months immediately preceding and following the suspension period.

5.

Plaintiff's Sub-heading "D, E, F," Page 28.

Plaintiff's only criticism of these methods is that it says they do not take into consideration, (1) the top heavy cost of sales operation during the suspension period, and (2) the fluctuations in the cost of raw materials and manufacture.

With regard to the first we might point out that there is no evidence that the cost of sales organization varied in any way after the fire from what it had been before the fire, or that the fire caused any such variation if there was one. With regard to the second point, we did specifically take into consideration in these computations, as in all other computation, the total cost of manufacturing the gasoline, which necessarily includes the cost of raw materials, and we took the figures given by plaintiff's own witnesses.

6.

Plaintiff's Sub-heading "G, H, I," Pages 28-31.

This is the method which we believe to have been the correct one. It is a comparison of the extra cost of the purchase of gasoline over the cost of manufacturing thereof, as *estimated by plaintiff itself in Exhibit 7* (App. 5 to Op. Br.), and upon which exhibit plaintiff itself bases its claim that it cost it more to purchase gasoline than to have manufactured gasoline.

Admittedly plaintiff suffered an actual loss during the suspension period of $32,975.68. (Deft. Br. p. 29.) It would have saved $30,995.94 had it manufactured *all* the gasoline it purchased during the suspension period. (Pl. Ex. 7.) Even if it had manufactured *all* of this gasoline, which admittedly it would not have done, it still would

have operated at a loss of $1,979.74 for the suspension period, and therefore would have made no profit.

Plaintiff here again tries to avoid the effect of its Exhibit 7. Plaintiff introduced this exhibit to support one of its own contentions and cannot now avoid the effect thereof by referring to matters which it says *might* have changed the result shown on that exhibit. As there is no evidence of these "might have beens", there is nothing to contradict the exhibit on the point.

Plaintiff contends, page 29, that these figures show that plaintiff would have been "smarter" not to have continued in business during the suspension period, and it says, page 30, that plaintiff's loss would have been immeasurably greater had it not continued in business. These statements seem contradictory. We need not consider them. The question is not whether plaintiff would have done better to have closed down, or whether plaintiff saved money by not doing so. The sole question is whether, had there been no fire, plaintiff would have made a net profit. Plaintiff's own figures conclusively establish that it would not have done so.

Plaintiff says, page 31, that Mr. DeCamp told it to proceed to purchase gasoline and attempt thereby to minimize its loss. A reference to the transcript, pages 209-211, shows that Mr. DeCamp said nothing whatever about purchasing gasoline. Of course, at that time Mr. DeCamp did not know whether the fire would occasion a loss of profits, and merely told the plaintiff to do what it could to minimize the loss covered by the policy, an obligation it was under anyhow under the provisions of the policy.

Finally, plaintiff says that if an insured honestly tries to minimize its loss, that insured should be allowed a recovery even though it would not have made a profit had there been no fire. The policy, of course, contains no such provision, and it would not be reasonable if it did. If

there would have been no profits had there been no fire, then there necessarily would be no loss insured against by the policy which could be minimized. To allow a recovery because an insured tried to minimize a loss not covered by the policy, would in effect be to make the policy cover that loss. In this case it would be to rewrite the policy into one against loss generally instead of one merely against loss of profits.

III.

Reply to Brief in Support of Plaintiff's Cross-Appeal.

1.

Proof of Loss and Notice of Disagreement.

The cardinal fallacy in plaintiff's argument on this point is in a failure to distinguish between a mere ***general denial of liability*** and a disagreement with the amount of loss claimed.

If an insurer upon receipt of a proof of loss merely denies liability upon the policy, it may be that it should be deemed to have admitted the amount of loss, if there was liability. Likewise, if an insurer merely disagrees with the amount of loss, it might be deemed to have admitted liability for such loss as was sustained.

Thus if the defendant herein had merely denied liability on the ground for instance that the fire was deliberately caused by the insured or was not on insured premises, then on proof that the fire was not caused by the insured or was on insured premises, then it might not be in a position to deny the claimed amount of the loss. In the present case, however, the defendant never has denied liability, that is that its policy covered the fire. It does, however, claim that because of peculiar circumstances that fire occasioned no loss covered by the policy. Its notice of disagreement was not a denial of liability but a notice

that it disagreed in whole with the amount of loss claimed and admitted no loss in connection therewith. It waived any claim the fire was not covered by the policy. It definitely asserted its claim that the fire occasioned no loss covered thereby.

However, let us consider the policy provisions and notice of disagreement in detail. The Court will remember that while the policy involved in this case has been referred to as a use and occupancy policy (hereinafter referred to as U & O), in fact it is a California standard form fire insurance policy to which a U & O endorsement has been attached.

The provisions of the clauses headed, "Duty of Insured in Case of Loss" [Tr. pp. 32-34] and the provision for a notice of disagreement [Tr. p. 34] are applicable only to the case of a loss of physical property by reason of a fire, and are not applicable to a loss of profits or fixed charges and expenses.

Thus the policy provides under the heading, "Duty of Insured in Case of Loss," that the insured will furnish a proof of loss setting forth eight separate items. Only the first item has any application to a loss of profits or fixed charges and expenses by reason of a fire. The remaining items are applicable only where the loss consists of the loss of or damage to physical properties. They have no application where the loss claimed is that of the anticipated future profits and continuing fixed charges and expenses.

In this connection we call the Court's attention to the fact that subdivision (c) on the first page of the proof of loss furnished by plaintiff [Tr. p. 61] reads as follows: "The cash value of the different articles or properties and the amount of loss thereon is stated in detail in the inventory furnished, and the schedule attached hereto and

made a part hereof," and on the second page [Tr. p. 63] appears a series of columns, the first of which is headed, "Property, Items of Policy," under which appear "1st Item," "2nd Item," etc. After each of these items certain information is requested. No attempt has been made by plaintiff to segregate these items and, in fact, there is typed in over the words "First Item," the words "Total Policy," which is followed by the total claim of the plaintiff.

It is, therefore, in our opinion, very doubtful indeed whether any proof of loss is required where the loss is sustained under the U & O endorsement.

Turning now to the provision headed, "Ascertainment of Amount of Loss" [Tr. p. 34], we find that this requires the company to notify the insured in writing of its partial or total disagreement with the amount of loss claimed by the insured. This the defendant did do, the notification reading [Tr. p. 114]:

> "You are hereby notified the undersigned totally disagrees with the amount of loss claimed by you in said Preliminary Proof of Loss. . . ."

It is to be noted that in plaintiff's brief no reference is made to this part of the notice.

The policy provision further provides that said notice shall also notify the assured "of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendment thereto." Inasmuch as no "articles or properties" are involved in this claimed U & O loss, and inasmuch as the proof of loss set forth no "articles or properties" and contained no claim of the amount of loss on any "article or property" there not only was no requirement, but it would have been utterly impossible for the defendant to

have notified the plaintiff of the amount of loss, if any, it admitted on each of the different articles or properties set forth in the proof of loss.

This provision of the policy is applicable only where the loss claimed is a loss of specific property destroyed or damaged by reason of the fire.

However, even if the provisions of the policy can be construed as requiring the proof of loss to set forth the amount of loss if any claimed upon different "articles of properties" set forth therein, and even if the proof of loss could be considered as setting forth the amount of loss claimed upon these different "articles and properties" the notice of disagreement given by the defendant fully complies with the requirement of the policy, further reading as it does [Tr. p. 114]:

> "You are hereby notified . . . the amount of loss which this company admits on each or all of the items described in said preliminary proof of loss is nothing.
>
> "You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles, or on each or any of the different properties set forth in said preliminary proof of loss."

We fail to see how this notification could have more clearly notified the assured that the amount of loss which the defendant admitted on each of the different articles or properties was nothing and that it would not admit any loss on any of said different articles or properties.

We most earnestly submit, however, that where a policy provides that the company shall notify the insured in writ-

ing of the "amount of loss, if any, the company admits on each of the different articles of properties . . ." this requirement is fully complied with by a statement in writing that: "The amount of loss which the company admits on each or all of the items . . . is nothing," and that the company "does not admit that you suffered any loss on each or any of the different articles or on each or any of the different properties . . ." It seems to us that this is not only a literal compliance with the requirement of the policy, but is just as effective and gives to the plaintiff exactly the same information as if that letter had listed each "article or property" (assuming for the sake of argument that different "articles or properties" were specified in the proof of loss) and that after each of these items had been written the word nothing. Certainly this latter and laborious method would have been of no advantage to the plaintiff herein and would not have conveyed any greater information to it than was conveyed by the form of letter actually used. The substance of the communication in either event would have been exactly the same.

In this connection we would call the court's attention to certain of the maximums of jurisprudence as set forth in the California Civil Code as follows: *C. C.* 3528: "The law respects form less than substance." *C. C.* 3532: "The law neither does nor requires idle acts." *C. C.* 3542: "Interpretation must be reasonable."

We, therefore, submit that even if the provisions requiring such notice of disagreement can be said to be applicable at all to a claimed U & O loss, the defendant has fully and completely complied with both the letter and the spirit of said policy provisions in this respect and that the plaintiff was fully and clearly notified of the attitude of the company, namely, that it admitted no loss whatsoever coming under the terms of the U & O endorsement.

Plaintiff cites, p. 8, *Victoria Park Co. v. Continental Ins. Co.,* 39 Cal. App. 347, 178 Pac. 724. This case involved the destruction of property by fire. The proof of loss was not excepted to by the insurer except that ten days after its receipt a letter was written plaintiff stating:

> "According to your documents we are criticising Section 'C' and we are also criticising the elimination of the date of the fire."

The Court held that the statement, "According to your documents we are criticising section 'C' and we are also criticising the elimination of the date of the fire," did not *express* any disagreement with the *amount* stated by the company, either as to the whole or any part thereof. We cannot see how this case has any analogy to the present case, as abviously a statement "we are criticising section 'C' " is in nowise the equivalent of a statement of the amount of loss admitted on this item, or that no amount was admitted thereon.

In fact, the opinion of the court strongly implies that, no matter how inaptly worded, a notice informing the insured of the amount of loss admitted or that no loss whatsoever was admitted, would have been sufficient.

Plaintiff cites, p. 7, *Lauman v. The Concordia Fire Ins. Co.,* 50 Cal. App. 609, 195 Pac. 951. This case again involved the destruction of specific property by a fire.

The letter of disagreement merely stated that the company disagreed with the proof of loss because it failed to show any interest of the insured in the property damaged. This is entirely consistent with the company admitting that the *amount* of loss caused by the fire was exactly as claimed in the proofs.

This is particularly emphasized by the express statement of the court itself on page 620 as follows:

> "No objection is made in the letter to the amount of any loss, but it is based solely on the reason stated."

The court then points out that proof was made that the plaintiff had assumed liability for the goods destroyed and that no contention was made that the evidence was not sufficient to support the court's finding to that effect. The plaintiff therefore fully met the only objection raised by defendant's letter of disagreement and therefore was obviously entitled to recovery.

The present case is exactly the reverse of the *Lauman* case. In the *Lauman* case there was a denial of any *liability* but no disagreement with the amount of loss claimed. In the present case there is no denial of liability, but there is a total disagreement with the amount of loss claimed and a statement that the amount of loss admitted on each item was nothing.

We submit that the *Lauman* case is not authority for the contentions of plaintiff, but is strong inferential authority for the position of the defendant, since the opening part of the letter of disagreement in the *Lauman* case is much less specific than is the letter involved in the present case, and yet in the *Lauman* case the letter itself was ***not*** held to be insufficient, but was merely held to limit the right of the defendant to rely upon the specific objections therein set forth.

The court held that *having limited its disagreement* with the claimed loss to certain specific reasons, the defendant had to stand or fall upon these reasons.

It is true that in this case the court in *dictum,* says:

> "The general denial of all liability would not meet the requirements of its (insurer's) obligation under the policy to designate the different articles for which it disclaimed liability. (*Victoria Park Co. v. Continental Ins. Co.,* 50 Cal. App. 609, 195 Pac. 951.)"

The *Victoria Park Company* case, which we have just discussed, certainly does not support this statement since

in it, as we have seen, there was no denial of liability but merely a statement that a certain item was "criticised." The *Lauman* case itself, is merely to the effect that when a general denial of liability is specifically placed upon certain specific grounds, then liability on the policy cannot be avoided on other and different grounds. Even in the quoted *dictum* the court does not say that a general disagreement with the *amount* of loss claimed in a proof of loss or a general statement that the insurer does not admit any loss on any of the items is insufficient. The intimation in both cases is that such a general statement, if made without limiting qualification, is in fact sufficient.

We submit, however, that the notice of disagreement given by the defendant in the present case is not a mere notice of general disagreement, but is as specific as it can be made by the English language. We will repeat the wording of the notice of disagreement adding italics:

> "You are hereby notified the amount of loss which the company admits *on each or all* of the items specified in said preliminary proof of loss is *nothing.* * * * You are further notified that the undersigned *does not admit* that you suffered *any loss on each or any* of the different articles or on *each or any* of the different properties set forth in said preliminary proof of loss." (Italics added.)

2.

Failure to Have Appraisal.

It is true that the policy provides that if the parties fail to agree upon the amount of loss, the company shall demand in writing an appraisement.

However, the policy does not set forth any penalty to be incurred by the company for failure so to do, except that such appraisement thereupon ceases to be a condition precedent to the bringing of suit by the insured. [Tr. p.

35.] There is no provision whatever in the policy that a failure to demand the appraisement will establish the loss as the amount claimed in the proof of loss, or will deprive the company of any defense it would otherwise have, except that of plaintiff's suit being premature.

Plaintiff has cited no authority in support of its contention. The two cases plaintiff cites, pp. 16 and 17, merely hold that unless such appraisement is had the insured may not institute suit. We admit that this is no longer true where the policy provides that the company shall take the first step towards such appraisement, but fails to do so. In other words, we have never contended that this suit instituted by the plaintiff is premature.

Plaintiff stresses the use of the word "shall" in the policy provision, "If the insured and this company fail to agree in whole or in part as to the amount of loss within ten days after such notification, this company *shall* forthwith demand in writing an appraisement. . . ." However, in *Grotz v. Insurance Company of North America,* 282 Pa. 224, 127 A. 620, the policy provision was, "In case the insured and this company shall fail to agree as to the amount of loss or damage each *shall,* on the written demand of either, select a competent and disinterested appraiser." The assured did in writing demand an appraisal. The company refused to appoint an appraiser. Despite the use of the word "shall" in the policy which, incidentally, was a statutory form, the court held that the failure of the company to comply with this provision did not deprive it of its defense on the merits to plaintiff's action, or of its privilege of requiring the plaintiff to establish by proof the amount of loss which the plaintiff had sustained.

To the same effect is *Penn. Plate Glass Co. v. Spring Garden Insurance Co.,* 189 Pa. 255, 42 A. 138, 139, in which case, while the court does not specifically mention a

written demand by plaintiff, it does appear that the plaintiff did make a sufficient demand for an appraisement, and that the defendant refused to participate therein.

The question of the effect of a failure to have an appraisement is dealt with in a lengthy note in 94 *A. L. R.* 499, 515.

Plaintiff never requested an appraisement or otherwise called the matter to the attention of defendant. It certainly is not the law that a breach, possibly unintentional, of a contract in one respect deprives that party of all defenses thereon. A contract provides that the purchaser shall pay the purchase price in installments but contains no acceleration clause. The purchaser fails to pay an installment when due. This does not give the seller the right to sue immediately for the entire amount.

Assume that each party to a contract breaches some provisions thereof. Is each thereby deprived of all defenses to an action by the other?

We submit that common sense and the authorities establish that in the absence of contract provisions to the contrary, the only effect of a breach of a provision of a contract is: (1) possibly to permit the other party to rescind or (2) to allow that other party the damage he has sustained by the particular breach and that the burden is on him of establishing the amount of such damage.

IV.

The Amount Allowed by the Court on Account of Fixed Charges and Expenses.

Defendant complains on its appeal of the method which the court adopted in arriving at the amount of fixed charges and expenses which it allowed, namely, cutting half the amount claimed by the plaintiff. While there is authority which would support the action of the court in

taking a more or less arbitrary figure, provided that figure is not in excess of what the evidence shows to have been such fixed charges and expenses (*Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.,* 64 Fed. (2d) 347, 352), we do not believe that this is a satisfactory method of arriving at the determination.

In this connection it will be remembered that in order to entitle to recovery under the policy for fixed charges and expenses, those fixed charges and expenses must not only have been incurred but they must have been the fixed charges and expenses listed under Item 2 of the policy [Tr. pp. 13-14], they must have necessarily continued during the suspension of business [Tr. p. 16], and they must also have been such charges and expenses as would have been earned had no fire occurred. [Tr. p. 16.]

It is our contention that such charges and expenses are not recoverable where the evidence shows that the insured would not have operated at a profit, but would have sustained a loss, *Goetz v. Hartford Fire Ins. Co.,* 193 Wis. 638, 215 N. W. 440, 441, and that consequently the plaintiff was entitled to no recovery under Item II.

Even if the plaintiff would have earned certain fixed charges and expenses a large number of those included in the award by the Court do not come within the items set forth in Item II of the policy. [Tr. pp. 13-14.]

There was no evidence that any of the employees whose salaries are included in the amounts claimed by plaintiff were indispensible employees; it positively appears from the evidence that the superintendents, executives and employees of the plaintiff were not under contract; a number of these salaries were actually repaid to the plaintiff by the insurance company carrying its regular fire insurance policy, salaries included in the award were in fact not paid in that amount; a proportion of all these charges and expenses, were properly chargeable against its business of

purchasing and selling gasoline rather than its business of manufacturing and selling gasoline; and practically every item of plaintiff's claim for fixed charges and expenses was exaggerated.

We submit that even if it were shown by the evidence that these fixed charges and expenses would have been earned by the plaintiff, which we believe the evidence negatives rather than shows, they would not have exceeded either $5,801.25 or $6,198.20 according to the basis used in arriving at the amount. [Tr. pp. 358-261.]

We submit that while the method adopted by the court is not one to meet with unqualified approval, nevertheless the plaintiff has not been injured thereby.

V.

Conclusion.

Wherefore, it is respectfully submitted that the judgment in favor of the plaintiff in so far as it awarded the plaintiff $22,974.94 for alleged loss of profits which it would have earned, should be reversed, but that since the defendant did not appeal therefrom there is no necessity for a reversal of the remainder of said judgment.

Respectfully submitted,

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No. 10,494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

General Insurance Company of America, a corporation,

Appellant,

vs.

Pathfinder Petroleum Company, a corporation,

Appellee,

and

Pathfinder Petroleum Company, a corporation,

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General Insurance Company of America, a corporation,

Appellee.

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

PETITION FOR REHEARING.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Appellant*, vs. PATHFINDER PETROLEUM COMPANY, a corporation, *Appellee*, AND PATHFINDER PETROLEUM COMPANY, a corporation, *Appellant*, vs. GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Appellee*.	No. 10,494 Aug. 29, 1944

Upon appeals from the District Court of the United States for the Southern District of California, Central Division.

Before: GARRECHT, DENMAN and STEPHENS, Circuit Judges.

DENMAN, Circuit Judge:

The General Insurance Company of America, hereinafter called the Insurer, appeals from a judgment of the district court awarding $30,327.57 as a loss for which it held Insurer liable upon a use and occupancy policy insuring Pathfinder Petroleum Company, hereinafter called the Insured, against its loss of "net profits of the business" and certain fixed charges which were occasioned by a fire destroying Insured's plant for the manufacture of gasoline. The Insured appeals from the same

judgment which awarded only a portion of the fixed charges and expenses claimed by it under a provision of the policy insuring such charges and expenses during the period of loss of use and occupancy caused by the fire. The physical loss from the fire was insured in a separate policy with which we are not here concerned.

The Insurer's Appeal.

The policy provision in question, customarily issued in this class of insurance, is clear and direct in its terms. The policy covered the "actual loss sustained" during a ninety day period of suspension by fire of the use and occupancy of Insured's gasoline refining plant "consisting of: Item I. The net profits on the business which is thereby prevented: . . ."

The problem presented to the Insured to sustain its burden of proof of the loss of net profits ordinarily consists of determining (a) the total cost, including depreciation,[1] of manufacturing the merchandise the production of which is prevented during the period of the use and occupancy coverage——in this case ninety days——and, (b) the price at which the product would have been sold in that period, either by prior sales agreement or the current market price in the absence of such commitments. The manufacturing cost is ordinarily shown by the prior experience of the plant in producing the merchandise. The prior sales price may or may not be relevant. It may be of no value if the actual sales price may be shown either by prior commitment or the market price current during the period of prevented production covered by the insurance and the prior sales experience show no logical connection with the sales price during the suspension period.

Instead of making proof in the method customary to business, the Insured offered different evidence. The reason is obvious. Insured's plant began its operations on January 1, 1940. It was destroyed by fire on August 31, 1940. Its average cost of producing gasoline in the eight months was 4.608 cents

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[1]Fidelity-Phoenix Insurance Co. v. Benedict Coal Corp., 64 F. 2d 347 (CCA-4).

per gallon. During the first five months the average sales price per gallon rose steadily, as follows:

Month	Price received per gallon in cents
January	6.485
February	6.561
March	6.671
April	7.014
May	7.203

There was a substantial drop in the sales price for the succeeding three months to the fire, as follows:

June	6.467
July	6.171
August	5.973

Again it dropped during the three months of the ninety days of the coverage to

September	6.177
October	6.146
November	5.928

The average sales price for the three periods was as follows:

January-May inclusive	6.787
June, July, August	6.203
September, October, November——the suspension period	6.084

The average profits per month for the second period dropped with the selling price of the gasoline. They were

Average profits (without depreciation) per month

January to May 31	$8,296.09
June, July, August	$2,598.03

It is obvious that with the succeeding still lower selling price of the gasoline of 6.084 cents per gallon, the profits in the suspension period in question well could be much less and, when depreciation is added to cost in determining profit, quite likely would disappear, even granting a ten percent raise in the

plant's production in the three months period as claimed by Insured.

Insured does not question these significant facts but insists that, in spite of them, its measure of damages is the average of the monthly profits computed by adding the higher profits of the first earlier months to the much lower profits of the last three months before the fire. It claims its right arises from the words "due consideration shall be given," in a policy provision that "In determining the amount of net profits . . . for the purpose of ascertaining the amount of loss sustained . . . due consideration shall be given to the experience of the business before the fire and the probable experience thereafter."

Common sense as well as the legal maxim that "Interpretation must be reasonable," (California Civil Code § 3542) requires us to interpret the "due consideration" as "rational consideration." There is no rational relationship that business men would recognize in a suit upon a contract guaranteeing, say, certain profits on a plant built by one party for another, between profits of the five high sales price months from January to May 31 and those to be estimated for September, October and November, when the sales price had such a heavy drop.

It is true that where the provisions of an insurance policy are subject to two or more interpretations, that which is adverse to the insurance company must prevail. If the figures for the period from January 1 to August 31 had shown some continuous consistent monthly profit and no substantial variation of production cost and sales price, no doubt under the policy they would prevail over a profit estimate based upon a calculation of production cost and sales price during the ninety day period. However, if the arbitrary blending of the earlier five months and the last three months were allowable, because both were "the experience of the business before the fire," then, as well, could be added together and averaged an experience of a year's loss preceding the fire and an experience of large profits in the next preceding year. Such an arbitrary "consideration" of experience is not a rational or "due consideration."

The district court's opinion accepted the Insured's contention. It makes no analysis of the experience and no mention

of the uncontradicted facts above set forth, but stated "As stated before, the policy provides that in ascertaining the loss due consideration shall be given to the experience of the business before the fire. Even the expert witness for the defendant testified that the plaintiff operated at a profit for the total eight months prior to the fire . . . I therefore find that the plaintiff did operate at a profit for the eight months previous to the fire and find such profits to be the sum of $49,274.54."

In determining the profits the district court refused to consider the figures of depreciation on the plant and machinery of a book value of around $250,000, of which the Insured's own auditor witness testified

> "Q. . . . When you were figuring it, [depreciation] taking the value of the plant as the basis, did you not also, in so figuring it, take an estimated time for the life of the plant?
>
> A. Yes.
>
> Q. Now, I am asking you what was that estimated time of the life of the plant that you so took?
>
> A. It was based on from 5 to 16 or perhaps 20 years. I couldn't say offhand without having my report where I worked up that comparison. Some parts of the plant will wear out in 5 years. Other parts, the tanks, for instance, would last 16⅔ years.
>
> Q. Did you take an average figure as representing the life of the plant in order to work it out on the basis of its valuation?
>
> A. I took the annual depreciation on each particular part of the plant——what the annual depreciation would be for the year, and after I had arrived at the total depreciation of all the different parts in the plant for the entire year, then I took a total of that. That gave me the total annual depreciation allowable under federal income tax laws. And then we based our depreciation on 10 cents per barrel through-out, which [figure of $26,843.43 or 10.73-plus percent per annum on a $250,000 gasoline plant] tied pretty close into the figure arrived at on a straight line depreciation method."

Instead, the district court accepted a figure of $3,034.99 for the eight months before the fire. This is at the rate of but 1.84

percent per annum on the $250,000——an astonishing figure for a plant of intricate machinery and processes——the longest item, its housing, having a 20-year life, and its "tanks on one side, process equipment on the other, boilers and so forth," with lives of 5, 16 and 16⅔ years. Instead, at 1.84 percent, the average life of all the machinery and its housing is over 54 years.

No analysis of the 1.84 percent result is given. It rests upon a mere feeling of the witness Devere that it was offered because "we *felt* that that represented the true depreciation for the first eight months. There was considerable depreciation of material values, and we *felt* that that properly and correctly reflected the actual depreciation in the plant during that period." However, on cross-examination, he testified in detail regarding the figure of $26,843 or 10.73-plus percent, the depreciation for the year for the plant shown on its books, that "We arrived at that figure originally by taking the total plant value and appraising the life of the individual unit parts of the plant; tanks on one side, process equipment on the other, boilers and so forth; and working out a composite annual figure in dollar and cents, and reduced that to the barrel basis anticipated on the average number of barrels to be run through the refinery."

We do not agree that what was merely "felt" by Insured's president to be an amount of depreciation is sufficient to sustain a finding of a depreciation of 1.84 percent on the $250,000 plant, when taken in consideration with his cross-examination on the subject and that of his auditor.

A polymerization plant was contracted to be built in the destroyed premises in the ninety-day period. It was proved that it could have been built and would have earned in net profits in that period the sum of $3,901.15. The Insurer does not question this amount of loss of net profits, but claims that because the unit was not built no recovery can be had. We do not agree. The net profits insured were from the Insured's business of manufacture of gasoline. The contract for the polymerization plant's installation and its operation was a part of the business of such manufacture. The loss of its use and

occupancy prevented the profit. We can see no difference between profits flowing from a contracted capital investment in a plant structure to assist in making gasoline and the profits flowing from a contracted current investment in the mineral oil which is manufactured into gasoline. We agree with the district court's award of $3,901.15 for such loss of net profits.

The Insured's Appeal.

In addition to the net profits, the policy covered the actual loss sustained by reason of the ninety day suspension of the use and occupancy of the plant, consisting of

> "Item II. Fixed charges and expenses, only to the extent to which they would have been earned had no fire occurred, as follows: Salaries of indispensable employees, superintendents, executives and of employees under contract, taxes, interest, rents, royalties, insurance, premiums, advertising, special contracts, dues, subscriptions, directors' fees, accounting expenses, legal expenses and fees, all other fixed charges and expenses not including expenses, (if any) insured under Item III."

The Insured appeals from an award of damages in the amount of $7,348.63. The district court arrived at this figure by dividing in half expenditures in the amount of $14,697.27. Concerning certain of these expenditures, the Insured's brief admits

> "The trial court was of the opinion——and there is evidence to support his view——that some of the indispensable employees of the refining unit were used during the suspension period in plaintiff's sales organization, which continued operating during the suspension period. It does not appear, nor would it be possible to say from the figures in the transcript, what employees of the refining unit were made use of in the sales organization, nor is there any testimony in the record by which the value of such services to the sales organization, whether full or part time, could be ascertained. . ."

Nowhere has the Insured sustained its burden of showing the exact amount of the expenditures attributed to the sus-

pension of the plant as distinguished from that attributable to its business of the purchase and sale of gasoline produced by other refiners,——that is, the business not covered by the policy. Failing in this, there is no showing of prejudice in the amount awarded. On this ground we sustain the award of $7,348.63.

The Insured claims that it should have been awarded the larger sum of $37,672.21, the amount claimed in its proof of loss, because of the failure of the Insurer properly to express its disagreement with the items of the proof of loss. The policy provision is that within a certain period "the Company shall notify the insured in writing of [a] its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the [b] amount of loss, if any, the Company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto."

Insured served on the Insurer its proof of loss with various items of loss which it claimed were caused by the suspension of the use and occupancy of the plant. As to the requirement [a] in the above quoted matter, the Insurer in due time notified the Insured "You are hereby notified the undersigned totally disagrees with the amount of loss claimed by you in said Preliminary Proof of Loss. . ." As to the requirement [b] "the amount of loss, if any, the Company admits on each of the different articles or properties," the Insurer in due time responded in writing, as follows:

> "You are hereby notified . . . the amount of loss which this company admits on each or all of the items described in said preliminary proof of loss is nothing.
>
> You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles, or on each or any of the different properties set forth in said preliminary proof of loss."

Insured claims that instead of the single statement that Insurer admits a liability of "nothing" on "each . . . of the items described in said preliminary proof of loss," it should have repeated each item of the proof and after each item repeated

the statement that it admitted "nothing." We regard Insured's contention as violative of the elementary axiom expressed in § 3532 of the California Civil Code as "The law neither does nor requires idle acts."

Insured relies upon Victoria Park Co. v. Continental Insurance Co., 39 Cal. App. 347, and Lauman v. Concordia Fire Insurance Co., 50 Cal. App. 609. In neither of the cases was there a statement of the insurance company that it admitted nothing as to each item in a proof of loss. We agree with the district court in not awarding as damages the larger amount claimed in the proof of loss because of the form of the refusal to admit liability.

The Insured also claims that the district court should have awarded the larger amount of the proof of loss because the Insurer failed to demand an appraisal under the policy provision that

> "If the insured and this Company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this Company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the Company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire."

No such ground of recovery is alleged in the complaint, which claims only that the failure to comply with the requirement with respect to the admission of liability for the items of the proof of loss required an award of the amount there shown, without further proof. Furthermore, at the opening of the trial, the Insured's counsel, in response to an inquiry of the court as to whether the trial was to be "simply a question of the amount due," stated that there was the question "whether or not the defendant insurance company has made sufficient objection to a detailed proof of loss." Then followed

"The Court: No. But I mean if your position as to the sufficiency of their objection to your proof of loss, if the court should rule against you on that——

Mr. Penney: That is right.

The Court: ——then it would be a question of the detailed determination as to the amount of your damages?

Mr. Penney: That is correct."

There followed two days of trial in which no contention was made that the failure to appoint an appraiser entitled the Insured to the entire $39,672.21 without any proof of the "actual loss sustained." Then came the district court's opinion showing that it based its award of damages on the evidence produced and its judgment awarding damages for but $30,323.57. We may assume that the Insured "mended its hold" in its briefs to the district court, but we are of the opinion that the court properly disregarded the unpleaded claim, if valid, as waived by the statements and conduct of the Insured. We are of the opinion also that the failure to demand an appraisal does not penalize the Insurer by depriving it of its defenses under the policy. That instrument provides no such penalty.[1]

Insured relies on two California decisions, Sausalito L. & D. D. Co. v. Commercial Union Assur. Co., 66 Cal. Rep. 253, and Adams v. South British and Natl. Fire Ins. Co.s, 70 Cal. 198. These decisions held that the insured had no right of action against the insurer until "a fair effort on the part of the insured" was made to procure the arbitration provided in the policy. In the instant case there is no question that the Insured has the cause of action upon which it brought suit and in which it permitted, without objecting on the ground of failure to demand arbitration, the Insurer's defenses that the losses were not those claimed in the proof of loss.

The portion of the judgment from which the Insured appeals is affirmed. The judgment against the Insurer so far as it awards damages for net profits is reversed and remanded for

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[1]Cf. Grotz v. Insurance Co. of North America, 282 Pa. 224; Penn. State Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255.

a new trial in which consideration shall be given to the matters decided in this opinion.

Affirmed in part and reversed in part.

STEPHENS, Circuit Judge:

I concur in the opinion other than in its discussion of depreciation. As to that I believe we have no occasion to hold that the trial court's findings as to depreciation are erroneous.

(Endorsed:) Opinion and Concurring Opinion. Filed Aug. 29, 1944. Paul P. O'Brien, Clerk.

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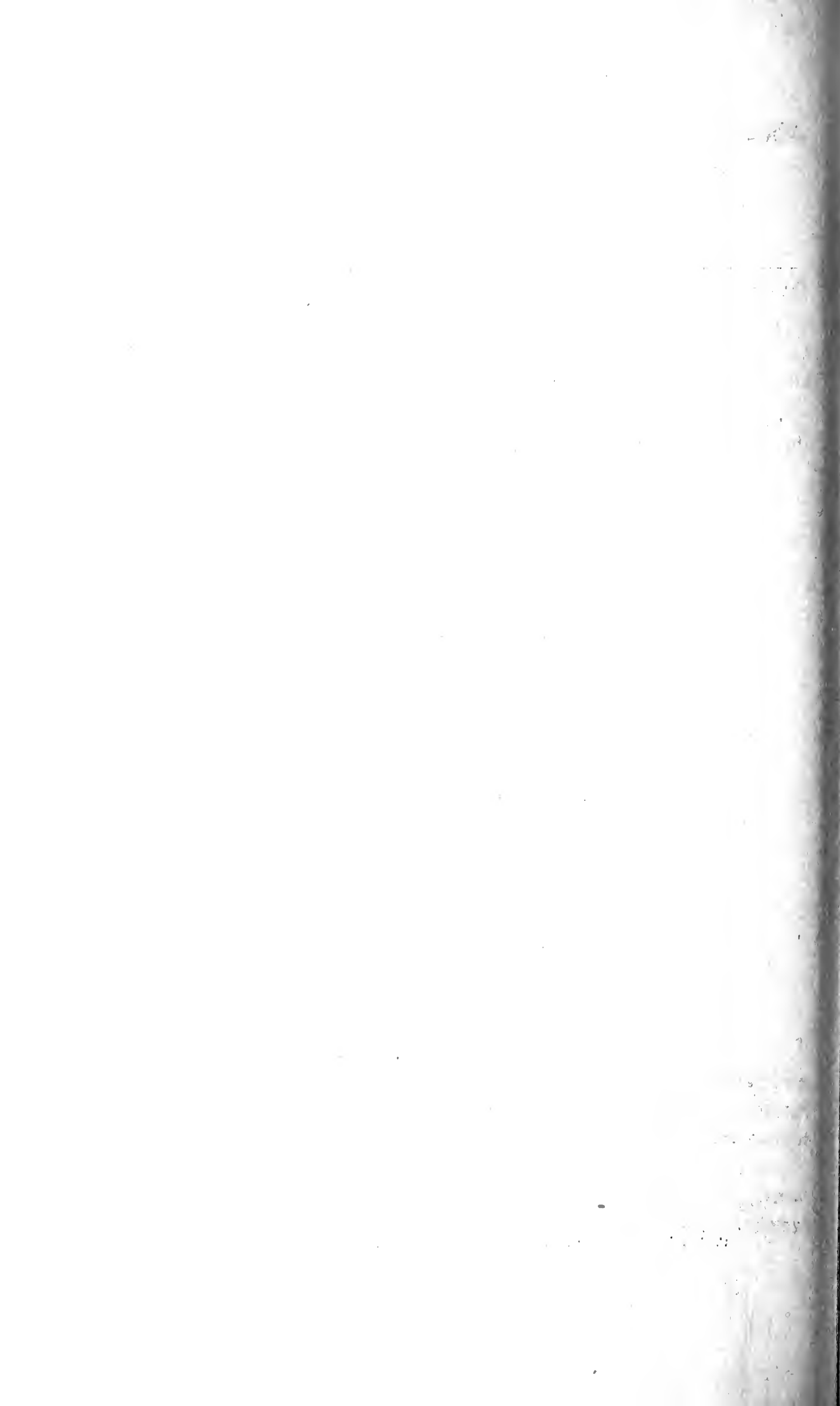

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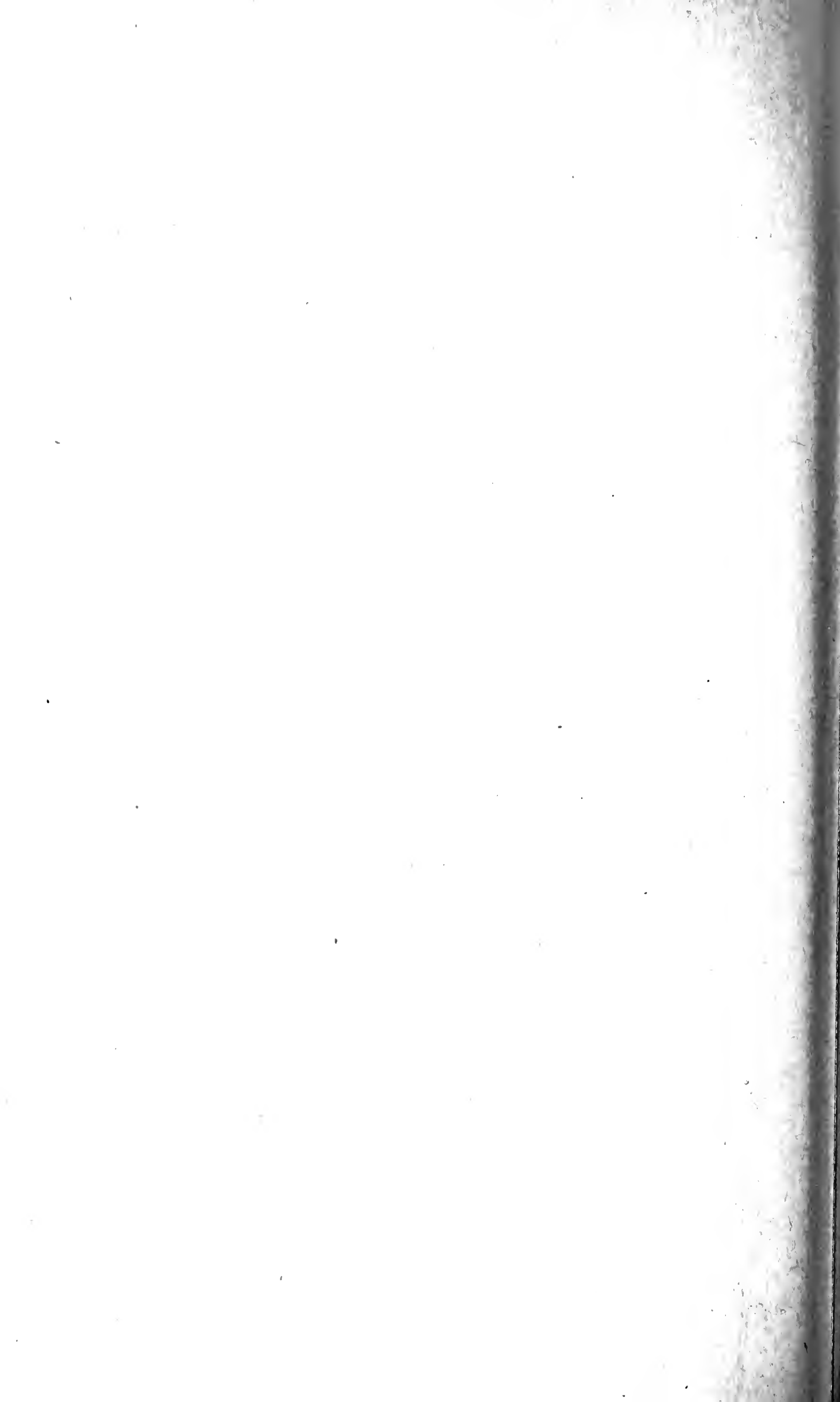

No. 10,494

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellant,

vs.

PATHFINDER PETROLEUM COMPANY, a corporation,

Appellee,

and

PATHFINDER PETROLEUM COMPANY, a corporation,

Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

---

PETITION FOR REHEARING.

Comes now Pathfinder Petroleum Company, a corporation, appellant and appellee herein, and respectfully peti-

tions the above-entitled court for a rehearing of the above-entitled cause. The opinion of the above-entitled court was filed herein on the 29th day of August, 1944.

For grounds of petition, petitioner alleges as follows:

Grounds of Petition.

I.

A rehearing is necessary in the above-entitled cause to give further consideration to the question of depreciation. More particularly, the existing decision is erroneous in that it fails to recognize depreciation as a proper item of fixed charges, and at the same time requires depreciation to be deducted in computing the net profits of petitioner contrary to well-established rules of accounting and contrary to the express admission of the General Insurance Company of America.

II.

A rehearing should be granted for the purpose of clarifying the mandate of the court providing that a new trial should be had, "so far as it (the judgment) awards damages for net profits." A dispute has arisen whether the petitioner is now entitled, under the opinion of the court, to the amount of $3901.15 on account of the polymerization plant or whether as to that item the trial court is required to take further evidence.

ARGUMENT.

I.

Not Having Added Depreciation as a Fixed Charge, the Plaintiff Is Unfairly penalized in Now Being Required to Deduct It From the Profits.

Depreciation is defined by Saliers, in his standard work on the subject, as follows:

> "Interpretation by Authorities.—The interpretations placed upon the word by some of those who have given thought to the subject will help one to arrive at a better conception of depreciation. One writer expresses it as 'loss in value which has occurred arising from the period during which the property of the undertaking has been in service,'[8] and adds that 'depreciation is, properly speaking, an operating expense and should be charged or treated as other operating expenses.'[9]
>
> "*Depreciation is in the nature of a fixed charge* rather than one varying with service.[10] The Interstate Commerce Commission has defined depreciation as 'exhaustion of capacity for service,' as 'lessening in cost value,' as 'lessening in worth of physical property.'[11] The Federal Trade Commission says that depreciation is the most important overhead expense.[12] An English authority employs the term 'expired capital outlay' as synonymous with depreciation.[13] The Supreme Court of Missouri calls it 'invisible rot.'[14]" (Italics ours.)
>
> *Depreciation, Principles and Applications,* Earl A. Saliers, New York, The Ronald Press, 1923.

"8. Hayes, H. V., *Public Utilities: Their Cost New and Depreciation,* p. 7.

9. *Ibid.,* p. 136.

10. *American Economic Review,* I, p. 476. The opposite view is that depreciation should be considered as a capacity cost varying with output. Various considerations render this theoretically untenable, although it is recognized by many authorities as a practical method.

11. *I. C. C. Valuation Docket No. 2,* pp. 48, 125, 183.

12. *Fundamentals of a Cost System for Manufacturers,* July 1, 1916, p. 12.

13. Leake, P. D., *Depreciation and Wasting Assets* (1917), p. 202.

14. *Home Telephone Co. v. City of Carthage,* 235 Mo. 644."

Any accountant familiar with the technical literature will readily state that this treatise is the standard authority on the subject.

The correctness of the foregoing principle that *depreciation becomes a part of the fixed charges* was conceded by the accountant for the defendant insurance company. We quote from his testimony as follows:

> "Q. What do the eight months show? A. The eight months showed a net profit of $26,194.25.
>
> Q. And that was after taking out how much depreciation? A. $23,079.59.
>
> Q. When you take an item of $23,000.00 depreciation out of the gross profits of the company, *doesn't that* [195] $23,000.00 *in your opinion become a part of the fixed overhead of the company?* A. *Yes, I believe that it would.*
>
> Q. Have you taken that $23,000.00 into consideration in comparing the figures which you have given to this court? A. No, sir, I haven't." [Tr. pp. 368-369.] (Italics ours.)

This admission is in accord with universal accounting practice. A most recent authority on the subject, expressing the same view, is W. B. Lawrence, *Cost Accounting,* Prentice-Hall, 1944, p. 181.

Common sense likewise requires the consideration of depreciation as an item of the fixed charges, because depreciation is in the nature of rent, towit, a fixed charge for the use of capital, and must therefore be, just like rent, a part of the invariable overhead of a business.

Item II of the policy, which the opinion quotes at length, states, after enumerating a number of specific

items of fixed charges, that "all other fixed charges and expenses not including expenses (if any) insured under Item III" are recoverable.

When the insurer wrote this policy, it must have had in mind the universally accepted meaning of the term "fixed charges." Therefore, *when it used the term,* "all other fixed charges and expenses," *it referred clearly, among other things, to depreciation.*

The plaintiff, then, was, under the terms of the policy, clearly entitled to *add* to its fixed charges under Item II a proper figure for depreciation. This it did not do, for the simple reason that if it had done so, and then *subtracted* depreciation under Item I (profits clause), the two would have cancelled each other out.

In other words, if, in arriving at the profits of the corporation, depreciation should be deducted, then, in arriving at the fixed charges of the corporation, the same depreciation must be added.

In view of these obvious considerations, and since depreciation would cancel itself out, it was not mentioned by plaintiff as an item of fixed charges. The small amount of depreciation in the sum of $3034.99 included in the calculation of the net profits is an outright contribution or gift to the insurer. It should not have been included in the computations at all. But plaintiff's inadvertent generosity should not now place it in a worse position where on the one hand large amounts of depreciation must be deducted in arriving at the net profits and where, on the other hand, no allowance for depreciation whatever is made in connection with the fixed charges and expenses.

As the matter stands now, the opinion of this court has deprived petitioner of an amount of net profits equal to the depreciation for the period in question without allowing it a corresponding increase in the fixed charges and expenses.

In conformity with the theory on which the case was tried without objection, depreciation should be eliminated from the fixed charges, and by the same token it *not be deducted from the profits.* We earnestly urge this court, in conformity with the concurring opinion of Mr. Justice Stephens, that these obvious and just principles be considered and that, to that extent, the majority opinion be modified to hold that the trial court's findings on the matter of depreciation are correct.

II.

The Final Disposition of This Cause May be Facilitated if the Court Will Correct Its Mandate to Show Clearly Whether the Question of the Profits From the Polymerization Unit Need be Retried.

The existing opinion states:

> "A polymerization plant was contracted to be built in the destroyed premises in the ninety-day period. It was proved that it could have been built and would have earned in net profits in that period the sum of $3,901.15. The Insurer does not question this amount of loss of net profits, but claims that because the unit was not built no recovery can be had. We do not agree. The net profits insured were from the Insured's business of manufacture of gasoline. The contract for the polymerization plant's installation and its operation was a part of the business of

such manufacture. The loss of its use and occupancy prevented the profit. We can see no difference between profits flowing from a contracted capital investment in a plant structure to assist in making gasoline and the profits flowing from a contracted current investment in the mineral oil which is manufactured into gasoline. We agree with the district court's award of $3,901.15 for such loss of net profits."

The opinion further states, in its mandate to the trial court:

"The portion of the judgment from which the Insured appeals is affirmed. The judgment against the Insurer so far as it awards damages for net profits is reversed and remanded for a new trial in which consideration shall be given to the matters decided in this opinion."

We believe that these portions of the opinion are plain and that, in conformity therewith, the total amount of the judgment thereunder is the sum of $7348.63 on account of fixed charges, and $3901.15 on account of the polymerization plant, or a total of $11,249.78 plus interest. To our surprise, however, we find in discussions with the attorneys for the insurance company, that they construe the closing paragraph of the court's opinion to mean that the question of the profits on the polymerization plant must be relitigated. This court could contribute much to a clarification of the stiuation by revising the closing portion of the opinion to point out specifically that the expected net profits from the polymerization plant are not to be retried, and that the retrial is to be restricted exclusively to the net profits made out of the remaining business operations of the corporation.

Conclusion.

It is therefore respectfully submitted that the court grant this petition for rehearing and, in so doing, reconsider the matter of depreciation and allow the trial court's findings in that respect to stand, and that it revise its mandate to the trial court by pointing out specifically that the retrial is restricted to the question of the net profits derived from the operations of the remaining business, and that the trial court's findings with respect to the expected profits from the polymerization unit are affirmed.

Respectfully submitted,

GEORGE PENNEY,
JEAN WUNDERLICH,
EARL GLEN WHITEHEAD,
Attorneys for Pathfinder Petroleum Company.

I, the undersigned, George Penney, being one of the attorneys for the petitioner herein, hereby certify that in my judgment and opinion the foregoing petition for a rehearing is well founded, and that it is not interposed for the purpose of delay.

GEORGE PENNEY.

Submitted ... District Judges

No. 10499

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

SANTA INEZ COMPANY, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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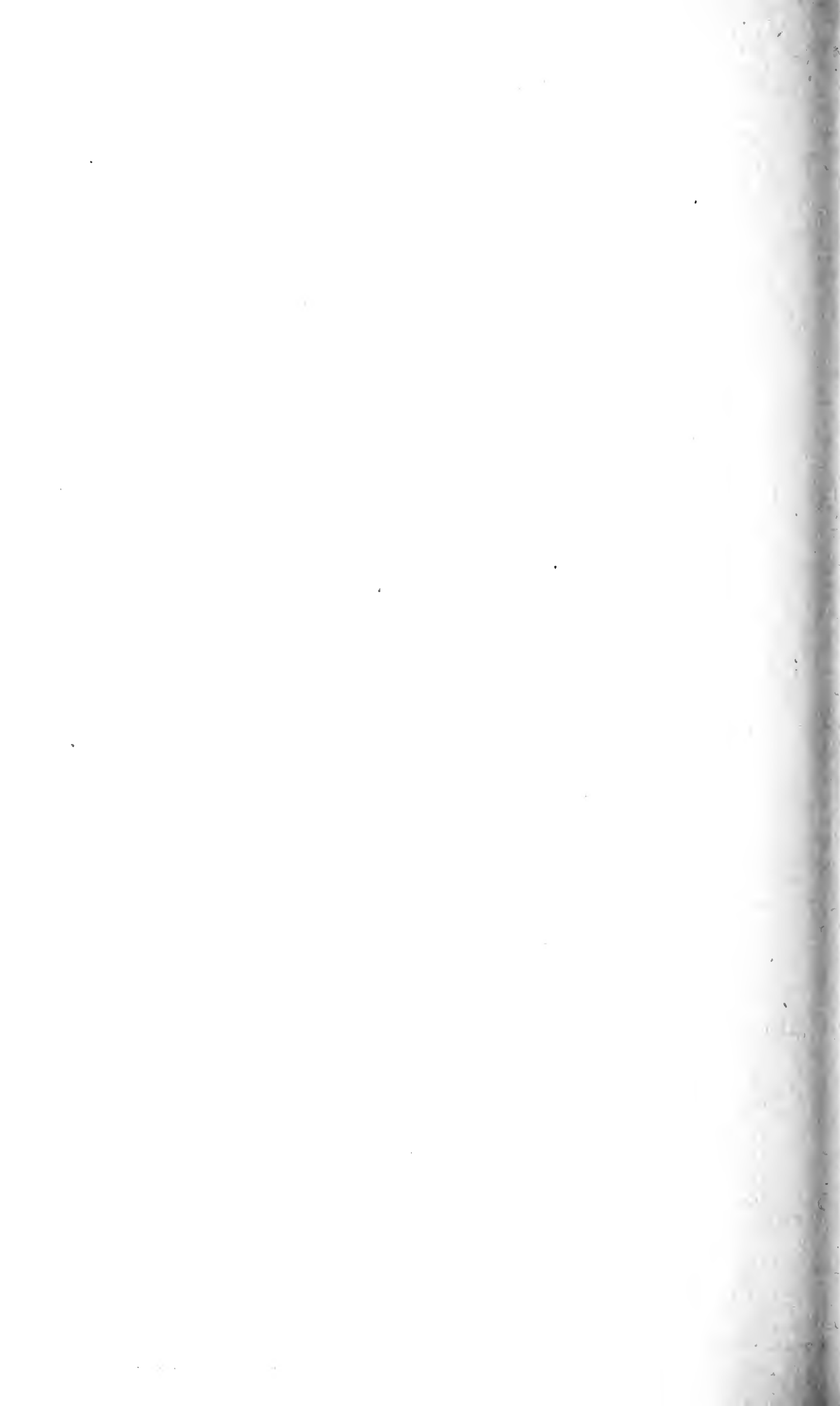

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 21785-L

SANTA INEZ COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR RECOVERY OF TAXES

Comes now plaintiff above named, and for cause of action against the above named defendant, complains and alleges:

I.

This action is brought to recover Federal corporate income and excess-profits taxes erroneously and illegally assessed and collected. The amount claimed in this action exceeds $10,000.00. Said taxes were collected by John V. Lewis, former Collector of Internal Revenue for the First District of California, and said John V. Lewis is not now in office as Collector of Internal Revenue. Jurisdiction of this Court is based upon [1*] the provisions of Section 24, subdivision 20 of the Judicial Code as amended; Title 28, U. S. Code Section 41, subdivision 20.

II.

At all times herein mentioned plaintiff was and now is a corporation duly organized and existing

*Page numbering appearing at foot of page of original certified Transcript of Record.

under and by virtue of the laws of the State of California.

III.

At all times herein mentioned plaintiff has kept its books of account and filed his tax returns upon the cash receipts and disbursements basis and upon the basis of a calendar year.

IV.

On May 1, 1933, Sacramento Medico Dental Building, Inc. (hereinafter sometimes referred to for convenience as "old corporation") was the owner of certain real property in Sacramento, California, with an office building situated thereon, together with certain furniture, furnishings and equipment in said building.

V.

On or about May 1, 1927, said old corporation created an original issue of $450,000.00 principal amount of first mortgage bonds and contemporaneously therewith as security for the payment of said bonds, executed a trust indenture in favor of Edwin L. Bowes as trustee, under which said real property and office building, together with all furniture, furnishings and equipment owned by said old corporation and used by it in the operation of said building, were conveyed to said trustee to secure the payment of said bonds. Subsequent to the execution of said trust indenture, Leigh M. Battson was [2] substituted as trustee in lieu of Edwin L. Bowes.

VI.

On May 1, 1933 there were issued and outstanding bonds of the aforementioned issue of the aggregate principal amount of $416,500.00, of which bonds in the principal amount of $16,500.00 were owned by stockholders of the old corporation. On said date said old corporation defaulted in the payment of interest on said bonds, and in the payment of the principal amount of such of said bonds as matured on May 1, 1933, which defaults were never cured. On said date a Bondholders' Committee was formed for the purpose of safeguarding the interests of all of the holders of said bonds. Pursuant to a deposit agreement entered into between said Committee and the holders of said bonds, bonds were deposited with said Committee by the holders thereof and said Committee issued to said depositing bondholders certificates of deposit evidencing the deposit of said bonds.

VII.

On March 6, 1934, a written plan of reorganization of the old corporation was entered into between the Bondholders' Committee, the old corporation and plaintiff, as the largest owner of outstanding bonds of the old corporation. Subsequently said plan of reorganization was amended in certain minor particulars.

VIII.

In pursuance of said plan of reorganization as amended, the following proceedings were taken:

(a) On October 3, 1934, at the request of the Committee, the trustee under the trust indenture

securing the bonds of the old corporation caused the property subject [3] thereto to be sold at public auction. At said sale said property was purchased by the Committee for the benefit of depositing bondholders for a sum less than the face amount of said outstanding bonds. At the date of said sale an aggregate of $361,700.00 principal amount of said bnods were on deposit with the Committee. Said bonds on deposit with the Committee represented approximately ninety per cent of the then issued and outstanding bonds, exclusive of $16,500.00 principal amount of bonds which were owned by stockholders of the old corporation and which, pursuant to the plan of reorganization, were cancelled as hereinafter set forth. The purchase price of the property acquired by the Committee at said trustee's sale was paid in manner following: By applying toward the payment of the purchase price the distributive share of the net proceeds of sale inuring to the $361,700.00 principal amount of bonds held by the Committee and by paying to the trustee in cash the distributive share of the net proceeds of sale inuring to the non-depositing bondholders.

(b) On November 8, 1934, Sacramento Medico Dental Building Company, (hereinafter sometimes referred to for convenience as "new corporation") was incorporated under the laws of the State of California by the Committee.

(c) On November 23, 1934, the Committee transferred to the new corporation the property acquired at said trustee's sale. In exchange therefor,

said new corporation delivered to the Committee for the ratable benefit of the depositing bondholders of the old corporation $361,700.00 principal amount of bonds of the new corporation and voting trust certificates for 3,617 shares of its capital stock, all of which stock was of a single class. Said 3,617 shares represented 45% of the issued [4] stock of the new corporation.

(d) Voting trust certificates for 4,420 shares of the capital stock of the new corporation were issued by the new corporation to stockholders of the old corporation. Said 4,420 shares represented 55% of the issued stock of the new corporation. The consideration for the issuance of said voting trust certificates to stockholders of the old corporation was the surrender by said stockholders for cancellation of the $15,500.00 principal amount of bonds of the old corporation owned by such stockholders and the payment to the Committee by the old corporation, for expenses of reorganization, of the sum of $33,779.92, which money was not subject to the lien of the trust indenture securing the bonds of the old corporation. The voting trust certificates issued to the stockholders of the old corporation were deposited in escrow as security for the full performance of the covenants of the trust indenture securing the bonds issued by the new corporation; under the terms of the escrow deposit, said voting trust certificates were to remain in escrow as long as any such bonds were outstanding and unpaid and if any default should exist under the trust indenture for thirty days, then the

stock of the new corporation represented by such voting trust certificates was to be cancelled by the escrow agent.

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IX.

Continuously from May 1, 1933 to and including the date of the trustee's sale on October 3, 1934, the value of all of the property owned by the old corporation was substantially less than the principal amount of its outstanding bonds.

X.

On October 30, 1934, plaintiff was the owner of [5] certificates of deposit covering $85,600.00 principal amount of bonds of the old corporation which plaintiff had theretofore acquired by purchase for the sum of $36,644.42. Said certificates of deposit represented $85,600.00 principal amount of said bonds which had theretofore been deposited with the Committee under and pursuant to the deposit agreement hereinabove referred to. On August 6, 1935 plaintiff exchanged said certificates of deposit, representing $85,600.00 principal amount of bonds of the old corporation, for $85,600.00 principal amount of bonds of the new corporation and voting trust certificates for 856 shares of stock of the new corporation. Said exchange was made pursuant to the plan of reorganization as amended and the proceedings hereinabove set forth.

XI.

The exchange by plaintiff on August 6, 1935 of its certificates of deposit covering $85,600.00

principal amount of bonds of the old corporation for $85,600.00 principal amount of bonds of the new corporation and voting trust certificates for 856 shares of stock of the new corporation gave rise to neither gain nor loss and the said exchange constituted a tax-free exchange either under the provisions of Section 112 (b) (3) or 112 (b) (5) of the Revenue Act of 1934.

XII.

On April 15, 1933 Whitney Estate Company was the owner of certain real estate in San Francisco, California, with an office building situated thereon.

XIII.

On or about April 15, 1928 Whitney Estate Company created an original issue of $1,200,000.00 principal amount of first mortgage bonds and contemporaneously therewith, as [6] security for the payment of said bonds, executed a mortgage in favor of American Trust Company as trustee under which said real estate and office building were mortgaged to said trustee to secure the payment of said bonds.

XIV.

On April 15, 1933 there were issued and outstanding bonds of the aforementioned issue of the aggregate principal amount of $1,175,000.00. On said date Whitney Estate Company defaulted in the payment of interest on said bonds and in the payment of the principal amount of such of said bonds as matured on April 15, 1933, which defaults

were never cured. On or about June 1, 1933 a Bondholders' Protective Committee was formed for the purpose of safeguarding the interests of all of the holders of said bonds. Pursuant to a deposit agreement entered into between said Committee and holders of said bonds, bonds were deposited with said Committee by the holders thereof and said Committee issued to said depositing bondholders certificates of deposit evidencing the deposit of said bonds.

XV.

On February 28, 1934, pursuant to a request therefor made upon it by said Committee, the American Trust Company, as trustee under the mortgage securing said bonds, caused the aforementioned real estate and office building which were subject to said mortgage, to be sold at public auction. At said sale said real estate and building were purchased by said Committee for the benefit of the depositing bondholders for a sum less than the face amount of said outstanding bonds. At the date of said sale an aggregate of $1,115,000.00 principal amount of said bonds, representing approximately 95% of the then issued and outstanding bnods were on deposit with said [7] Committee. The purchase price of the real estate and building purchased at said Trustee's sale was paid in manner following: By applying toward the payment of the purchase price the distributive share of the net proceeds of sale inuring to the $1,115,000.00 principal amount of bonds held by the Committee and by paying to the Trustee in cash the distributive

share of the net proceeds of sale inuring to the non-depositing bondholders.

XVI.

Continuously from April 15, 1933 to and including the date of the Trustee's sale on February 28, 1934, the value of all of the property owned by Whitney Estate Company was substantially less than the principal amount of its outstanding bonds.

XVII.

Commencing in the month of January, 1934 the Bondholders' Protective Committee engaged in formulating a specific plan of reorganization under which a new corporation would be formed to acquire, hold and operate the real estate and building hereinabove referred to for the benefit of depositing bondholders. Said plan of reorganization was consummated on or about December 1, 1934. Pursuant to said plan of reorganization, the real estate and building which said Committee acquired at said Trustee's sale was transferred to a new corporation known as "One Thirty-Three Geary Corporation" and in exchange therefor, the new corporation delivered to said Committee for the ratable benefit of the depositing bondholders of Whitney Estate Company 11,150 shares of the no par capital stock of One Thirty-Three Geary Corporation, being all of its issued capital stock and constituting the sole consideration for the transfer of said real [8] estate and building to One Thirty-Three Geary Corporation.

XVIII.

On February 28, 1934, plaintiff was the owner of certificates of deposit covering $136,000.00 principal amount of bonds of the Whitney Estate Company which plaintiff had theretofore acquired by purchase for the sum of $59,421.25. Said certificates of deposit represented $136,000.00 principal amount of said bonds which had theretofore been deposited with said Committee under and pursuant to the deposit agreement hereinabove referred to. On December 10, 1934 plaintiff exchanged said certificates of deposit representing $136,000.00 principal amount of Whitney Estate Company solely for 1,360 shares of no par value capital stock of One Thirty-Three Geary Corporation. Said exchange was made pursuant to said plan of reorganization and the proceedings hereinabove referred to.

XIX.

The exchange by plaintiff on December 10, 1934 of its certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company solely for 1,360 shares of no par value capital stock of One Thirty-Three Geary Corporation gave rise to neither gain nor loss and said exchange constituted a tax-free exchange either under the provisions of Section 112 (b) (3) or 112 (b) (5) of the Revenue Act of 1934.

XX.

In the original federal corporation income and excess-profits tax return filed by plaintiff for the

calendar year 1934, plaintiff did not report nor include any gain as a result of the exchange by plaintiff of the certificates of deposit covering $85,600.00 principal amount of bonds of Sacramento Medico Dental Building, Inc., for $85,600.00 principal [9] amount of bonds and 856 shares of stock (represented by voting trust certificates) of Sacramento Medico Dental Building Company, nor did plaintiff report nor include any gain as a result of the exchange by plaintiff of the certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company for 1,360 shares of stock of One Thirty-Three Geary Corporation. The net income reported in said original return was the sum of $7,169.06 and the amount of income tax shown to be due by said original return was the sum of $985.75, which sum was paid by plaintiff in the year 1935.

XXI.

On December 28, 1935 plaintiff filed with John V. Lewis, then Collector of Internal Revenue for the First District of California, an amended federal corporation income and excess-profits tax return for the calendar year 1934. In said amended return, plaintiff erroneously reported and included as gross income the sum of $27,555.58 as capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $85,600.00 principal amount of bonds of Sacramento Medico Dental Building, Inc.; such capital gain was determined by subtracting the sum of $36,644.42 (representing the cost of said bonds to plaintiff) from the sum

of $64,200.00 (representing plaintiff's pro rata shares of the fair market value, as of the date of the Trustee's sale, of the property which was subject to the trust indenture securing the bonds of Sacramento Medico Dental Building, Inc., and which was purchased by the Committee for the benefit of the depositing bondholders). In said amended return plaintiff further erroneously reported and included as gross income the sum of $44,907.70 as capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $136,000.00 [10] principal amount of bonds of Whitney Estate Company; such capital gain was determined by subtracting the sum of $59,421.25 (representing the cost of said bonds to plaintiff) from the sum of $104,328.95 (representing plaintiff's pro rata share of the fair market value, as of the date of the Trustee's sale, of the property which was subject to the mortgage securing the bonds of Whitney Estate Company and which was purchased by the Committee for the benefit of the depositing bondholders).

XXII.

On December 28, 1935 plaintiff paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the sum of $13,189.07, representing the amount of additional federal corporate income and excess-profits taxes shown to be due by the amended return filed by plaintiff as hereinabove set forth over and above the amount of federal corporate income taxes shown to be due

by the original return filed by plaintiff as herein-above set forth and paid by plaintiff at the time of the filing of said original return. On December 28, 1935, plaintiff further paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the sum of $626.48, representing interest on the said additional tax of $13,189.07. On December 31, 1936, after audit by the Commissioner of Internal Revenue of the returns filed by plaintiff as aforesaid during the year 1935, plaintiff paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the further sum of $16,972.23, representing $15,323.01 surtax on personal holding companies for the year 1934 and $1,649.22 interest on said surtax. Such surtax was imposed by the Commissioner of Internal Revenue by virtue of the failure of plaintiff to distribute to its stockholders [11] the alleged income realized by plaintiff as a result of the capital gain reported by plaintiff in its amended federal corporation income and excess-profits tax return for the calendar year 1934 resulting from the disposition by plaintiff of the certificates of deposit covering $85,600.00 principal amount of bonds of Sacramento Medico Dental Building, Inc. and of the certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company.

XXIII.

By reason of the fact that plaintiff had no net income for the calendar year 1934 in excess of the amount of net income reported by plaintiff in the

original federal corporation income and excess-profits tax return filed by plaintiff for said year, no federal corporate income or excess profits taxes in excess of the amount shown to be due on the original return filed by plaintiff for the calendar year 1934 were properly payable by plaintiff for said year and no surtax on personal holding companies was properly payable by plaintiff for said calendar year. Accordingly, federal corporate income and excess-profits taxes and surtax on personal holding companies and interest thereon in the aggregate sum of $30,787.78 were erroneously and illegally assessed and collected from plaintiff by John V. Lewis, former Collector of Internal Revenue for the First District of California.

XXIV.

Within the time and in the manner and form provided by law, plaintiff duly and regularly filed with the Commissioner of Internal Revenue its claim for refund of the sum of $30,787.78 as and for federal corporate income and excess-profits taxes and surtax on personal holding companies illegally [12] and erroneously assessed and collected from plaintiff on account of taxes for the calendar year 1934. In said claim for refund, plaintiff relied upon the grounds set forth in this complaint. More than six months have elapsed since the date of the filing of said claim for refund. The Commissioner of Internal Revenue has neither allowed said claim for refund nor has he mailed to plaintiff by

registered mail a notice of the disallowance of said claim, or any part thereof.

XXV.

No assignment or transfer of the claim which is the subject matter of this action has ever been made and plaintiff is the sole owner thereof. Plaintiff is fully entitled to the amount herein claimed from defendant and there is no just credit or offset against the said claim which is known to plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of $30,787.78, with interest at the rate of six per cent (6%) per annum from December 28, 1935 on the sum of $13,815.55 and from December 31, 1936 on the sum of $16,972.23 to a date preceding the date of the refund check by not more than thirty days and together with plaintiff's costs of suit herein incurred.

JOHN C. ALTMAN
Attorney for Plaintiff. [13]

State of California,
City and County of San Francisco.—ss.

John C. Altman, being first duly sworn, deposes and says:

That he is an officer, to-wit, President, of Santa Inez Company, a corporation, the above named plaintiff, and makes this verification as such officer for and on behalf of said plaintiff; that he has read the above and foregoing complaint for recovery of taxes, and knows the contents thereof; that the same is true of his own knowledge, except as to

matters therein stated upon information or belief, and as to such matters, he believes it to be true.

JOHN C. ALTMAN

Subscribed and sworn to before me this 17th day of February, 1941.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 18, 1941. [14]

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES

Now comes the defendant above named, and answers the complaint herein as follows:

I.

Answering Paragraph I of the complaint, defendant admits that this action is brought to recover Federal corporate income taxes; denies that the said taxes were erroneously and illegally assessed and collected. All other allegations of said Paragraph are admitted. [15]

II.

Admits the allegations of Paragraphs numbered II, III, IV, V and VI of the complaint.

III.

Answering Paragraph numbered VII of the complaint, defendant admits that on March 6, 1934,

a written plan of reorganization of the old corporation was entered into between the bondholders' committee, the old corporation and plaintiff, as the largest owner of outstanding bonds of the old corporation, but specifically denies that the said plan constituted a non-taxable reorganization; admits that subsequently said plan of reorganization was amended; and, except as thus expressly admitted, denies each and every other allegations of said Paragraph 7 of the complaint.

IV.

Answering Paragraph numbered VIII of the complaint, defendant admits that in pursuance of the said plan as amended certain proceedings were taken. However, defendant is without sufficient information to answer the said sub-paragraphs (a) to (d), inclusive, of said Paragraph VIII, and, therefor, denies them.

V.

Denies the allegations of Paragraph numbered IX of the complaint.

VI.

Answering Paragraph numbered X of the complaint, it is admitted that on October 30, 1934, plaintiff was the owner [16] of certificates of deposit covering $85,600 principal amount of bonds of the old corporation which plaintiff had theretofore acquired by purchase for the sum of $36,644.42. It is admitted that said certificates of deposit represented $85,600, the principal amount of said bonds

which had theretofore been deposited with the Committee under and pursuant to the deposit agreement hereinbefore referred to. All other allegations of said Paragraph are denied. Further answering Paragraph X, defendant alleges that on October 30, 1934, at a foreclosure sale the Bondholders' Protective Committee acquired the first mortgage bonds of the Sacramento Medico Dental Building, Inc., which then had a fair market value of $300,000; that a total of $400,000 of bonds out of $416,500 in bonds outstanding participated in the acquisition of the property by the Committee; and that the plaintiff realized its pro rata of the value of the property. Except as thus expressly admitted, defendant denies each and every allegation of Paragraph numbered X of the complaint.

VII.

Denies the allegations of Paragraph XI of the complaint.

VIII.

Admits the allegations of Paragraph XII of the complaint.

IX.

Admits the allegations of Paragraphs numbered XIII and XIV of the complaint. [17]

X.

Answering Paragraph numbered XV of the complaint, defendant admits that on February 28, 1934, pursuant to a request theretofore made upon it by said Committee, the American Trust Company,

under the mortgage securing said bonds, caused the aforementioned real estate and buildings which were subject to said mortgage to be sold at public auction; admits that at said sale said real estate and buildings were purchased by the said Committee for the benefit of depositing bondholders for a sum less than the face amount of the outstanding bonds. Defendant has no information or belief upon the remaining allegations of said Paragraph, and, therefore, denies them.

XI.

Denies the allegations of Paragraph XVI of the complaint.

XII.

The allegations of Paragraph numbered XVII of the complaint are denied. Further answering Paragraph XVII, defendant alleges that it was not until the bondholders came into possession of the property, about June 1, 1934, that a new corporation, One Thirty-Three Geary Corporation, was contemplated as being the best means of operating the building; that there was not at any time a continuing process of reorganization in pursuance of a well-defined plan.

XIII.

The allegations of Paragraphs numbered XVIII and XIX are denied. [18]

XIV.

Admits the allegations of Paragraph numbered XX of the complaint.

XV.

Answering Paragraph numbered XXI of the complaint, it is admitted that plaintiff filed with John V. Lewis, then Collector of Internal Revenue for the First Collection District of California, on December 31, 1935, rather than December 28, 1935, as alleged, an amended Federal corporation income and excess-profits tax return for the calendar year 1934. It is admitted that in said amended return plaintiff reported and included as gross income the sum of $27,555.58 as capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $85,600 principal amount of bonds of Sacramento Medico Dental Building, Inc. It is admitted that such capital gain was determined by subtracting the sum of $36,644.42 (representing the cost of said bonds to plaintiff) from the sum of $64,200 (representing plaintiff's pro rata share of the fair market value, as of the date of the Trustee's sale, of the property which was subject to the trust indenture securing the bonds of Sacramento Medico Dental Building, Inc., and which was purchased by the Committee for the benefit of the depositing bondholders). It is denied that the said above-mentioned report of income in said amended return was an erroneous report. It is further admitted that in said amended return plaintiff reported and included a gross income in the sum of $44,907.70 as capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $136,000 principal amount of bonds of Whitney [19] Estate Company. It is admitted that such capital gain

was determined by subtracting the sum of $59,421.25 (representing the cost of said bonds to plaintiff) from the sum of $104,328.95 (representing plaintiff's pro rata share of the fair market value, as of the date of the Trustee's sale, of the property which was subject to the mortgage securing the bonds of Whitney Estate Company and which was purchased by the Committee for the benefit of the depositing bondholders). It is denied that the said report was erroneous.

XVI.

The allegations of Paragraph XXII are admitted.

XVII.

Denies the allegations of Paragraph numbered XXIII of the complaint. Further, defendant alleges that the determination of the tax as set forth in Paragraph XXII of plaintiff's compliant and the payment thereof in the aggregate sum of $30,787.78, as set forth in Paragraph XXIII of pliantiff's complaint, were in all respects correct and in accord with the proper interpretation of the applicable Revenue Act as applied to the plaintiff's income for the year in question.

XVIII.

Answering Paragraph numbered XXIV of the complaint, it is admitted that within the time and in the manner and form provided by law plaintiff duly and regularly filed with the Commissioner of Internal Revenue its claim for refund of the [20] sum of $30,787.78 as and for Federal corporate

income and excess-profits taxes and surtax on the personal holding companies assessed and collected from plaintiff on account of taxes for the calendar year. It is admitted that in said claim for refund plaintiff relied upon the grounds set forth in its complaint. Except as thus expressly admitted, defendant denies each and every allegations of said Paragraph numbered XXIV of the complaint.

XIX.

Answering Paragraph numbered XXV of the complaint, defendant has no information or belief in the allegation that no assignment or transfer of the claim which is the subject matter of this action has ever been made and that plaintiff is the sole owner thereof, therefore denies said allegations. Denies the remaining allegations contained in Paragraph numbered XXV of the complaint.

XX.

Further answering, defendant alleges that the facts and circumstances of the transaction having to do with the acquisition of the assets of plaintiff's predecessor corporation fail to give the transaction the status of a non-taxable reorganization, under the provisions of law. Defendant alleges that the determination of the Commissioner of Internal Revenue and the assessment of the tax against plaintiff for the year in question and for which this suit is brought were in all respects proper and in accord with the provisions of the applicable Revenue Act. [21]

Wherefore, defendant prays judgment in its favor and for its costs and for such other relief as may be just.

FRANK J. HENNESSY
United States Attorney
ESTHER B. PHILLIPS
Assistant United States Attorney
Attorneys for Defendant

[Endorsed]: Filed May 28, 1941. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 10th day of July, 1942, before the above entitled Court, Honorable Claude McColloch, Judge presiding, without a jury, a jury having been duly waived; Willard L. Ellis, Esq., appearing as attorney for plaintiff and Frank J. Hennessy, United States Attorney, and Miss Esther B. Phillips, Assistant United States Attorney, appearing as attorneys for defendant, and after trial and the introduction of evidence, both oral and documentary, the said cause was submitted to the Court for its consideration and decision upon the issue as to the gain, if any, realized by plaintiff upon the disposition of bonds of Whitney Estate Company, [23] plaintiff having abandoned its contention that no

gain was realized upon the disposition of bonds of Sacramento Medico Dental Building, Inc., and the Court having considered the evidence, does now make the following

FINDINGS OF FACT

I.

This action was brought to recover Federal corporate income and excess-profits taxes erroneously and illegally assessed and collected. The amount claimed in this action exceeds $10,000.00. Said taxes were collected by John V. Lewis, former Collector of Internal Revenue for the First District of California, and said John V. Lewis was not at the time of filing of the complaint herein, and is not now in office as Collector of Internal Revenue. Jurisdiction of this Court is based upon the provisions of Section 24, subdivision 20 of the Judicial Code as amended; Title 28, U.S.C.A., Section 41, subdivision 20.

II.

At all times herein mentioned plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

At all times herein mentioned plaintiff has kept its books of account and filed its tax returns upon the cash receipts and disbursements basis and upon the basis of a calendar year.

IV.

On April 15, 1933 Whitney Estate Company was the owner of certain real estate in San Francisco, California, with an office building situated thereon.

V.

On or about April 15, 1928 Whitney Estate Company created an original issue of $1,200,000.00 principal amount of [24] first mortgage bonds and contemporaneously therewith, as security for the payment of said bonds, executed a mortgage in favor of American Trust Company as trustee under which said real estate and office building were mortgaged to said trustee to secure the payment of said bonds.

VI.

On April 15, 1933 there were issued and outstanding bonds of the aforementioned issue of the aggregate principal amount of $1,175,000.00. On said date Whitney Estate Company defaulted in the payment of interest on said bonds and in the payment of the principal amount of such of said bonds as matured on April 15, 1933, which defaults were never cured. On or about June 1, 1933 a Bondholders' Protective Committee was formed for the purpose of safeguarding the interests of all of the holders of said bonds. Pursuant to a deposit agreement entered into between said Committee and holders of said bonds, bonds were deposited with said Committee by the holders thereof and said Committee issued to said depositing bondholders certificates of deposit evidencing the deposit of said bonds.

VII.

In January, 1934, the Committee formulated a plan whereby American Trust Company, as trustee under the mortgage securing said bonds, would cause the aforementioned real estate and office building, subject to said mortgage, to be sold at public auction and purchased by the Committee for the benefit of the depositing bondholders, and whereby the property so purchased by the Committee would thereafter be transferred to a new corporation in exchange for all of the stock of said new corporation. On February 28, 1934, pursuant to a request therefor made upon it by said Committee, the American Trust Company, as trustee under the mortgage [25] securing said bonds, caused the aforementioned real estate and office building which were subject to said mortgage, to be sold at public auction. At said sale real estate and building were purchased by said Committee for the benefit of the depositing bondholders for a sum less than the face amount of said outstanding bonds. At the date of said sale an aggregate of $1,113,000.00 principal amount of said bonds, representing approximately 95% of the then issued and outstanding bonds were on deposit with said Committee. Subsequent to February 28, 1934 an additional $2,000.00 principal amount of bonds were accepted by the Committee for deposit. The purchase price of the real estate and building purchased at said Trustee's sale was paid in manner following: By applying toward the payment of the purchase price the distributive share of the net proceeds of sale inuring to the $1,-

115,000.00 principal amount of bonds held by the Committee and by paying to the Trustee in cash the distributive share of the net proceeds of sale inuring to the non-depositing bondholders.

VIII.

Because of the pendency of certain litigations to which Whitney Estate Company, the trustee and the Committee were parties, the Committee was unable until May 15, 1934, to obtain possession and clear title to the property which it purchased at the trustees sale. Immediately after obtaining possession and clear title to said property, the Committee proceeded with its plan to organize a new corporation and to transfer to said new corporation the property which it purchased at the trustee's sale. Said new corporation which was known as "One Thirty-three Geary Corporation", was incorporated on September 4, 1934. On or about November 30, 1934, the real estate and building which the Committee [26] had acquired at the trustee's sale was transferred to said new corporation and in exchange therefor the new corporation delivered to said Committee for the ratable benefit of the depositing bondholders of Whitney Estate Company, 11,150 shares of the no par capital stock of One Thirty-three Geary Corporation, being all of its issued capital stock and constituting the sole consideration for the transfer of said real estate and building to One Thirty-three Geary Corporation.

IX.

On February 28, 1934, plaintiff was the owner

of certificates of deposit covering $136,000.00 principal amount of bonds of the Whitney Estate Company which plaintiff had theretofore acquired by purchase for the sum of $59,421.25. Said certificates of deposit represented $136,000.00 principal amount of said bonds which had theretofore been deposited with said Committee under and pursuant to the deposit agreement hereinabove referred to. On December 10, 1934 plaintiff exchanged said certificates of deposit representing $136,000.00 principal amount of Whitney Estate Company solely for 1,360 shares of no par value capital stock of One Thirty-three Geary Corporation. Said exchange was made pursuant to the plan formulated by the Committee and pursuant to the proceedings hereinabove referred to.

X.

Continuously from April 15, 1933, to and including November 30, 1934, the value of all of the property owned by Whitney Estate Company was substantially less than the principal amount of its outstanding bonds.

XI.

Plaintiff realized no gain or less as a result of the purchase by the Committee on February 28, 1934, for the benefit [27] of depositing bondholders, of the property which was subject to the mortgage securing the bonds of Whitney Estate Company. The exchange by plaintiff on December 10, 1934, of its certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company solely for 1,360 shares of no par value capi-

tal stock of One Thirty-three Geary Corporation gave rise to neither gain nor loss and said exchange constituted a tax-free exchange under the provisions of Section 112(b)(5) of the Revenue Act of 1934.

XII.

In the original federal corporation income and excess-profits tax return filed by plaintiff for the calendar year 1934, plaintiff did not report nor include any gain as a result of the exchange by plaintiff of the certificates of deposit covering $136,-000.00 principal amount of bonds of Whitney Estate Company for 1,360 shares of stock of One Thirty-Three Geary Corporation. The net income reported in said original return was the sum of $7,169.06 and the amount of income tax shown to be due by said original return was the sum of $985.75, which sum was paid by plaintiff in the year 1935.

XIII.

On December 28, 1935 plaintiff filed with John V. Lewis, then Collector of Internal Revenue for the First District of California, an amended federal corporation income and excess-profits tax return for the calendar year 1934. In said amended return plaintiff erroneously reported and included as gross income the sum of $44,907.70 as capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company; such capital gain was determined by subtracting the sum of [28] $59,421.25 (representing

the cost of said bonds to plaintiff) from the sum of $104,328.95 (representing plaintiff's pro rata share of the fair market value, as of the date of the Trustee's sale, of the property which was subject to the mortgage securing the bonds of Whitney Estate Company and which was purchased by the Committee for the benefit of the depositing bondholders).

XIV.

On December 28, 1935, plaintiff paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the sum of $13,189.07, representing the amount of additional federal corporate income and excess-profits taxes shown to be due by the amended return filed by plaintiff as hereinabove set forth over and above the amount of federal corporate income taxes shown to be due by the original return filed by plaintiff as hereinabove set forth and paid by plaintiff at the time of the filing of said original return. On December 28, 1935, plaintiff further paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the sum of $626.48, representing interest on the said additional tax of $13,-189.07. On December 31, 1936, after audit by the Commissioner of Internal Revenue of the returns filed by plaintiff as aforesaid during the year 1935, plaintiff paid to John V. Lewis, then Collector of Internal Revenue for the First District of California, the further sum of $16,972.23, representing $15,323.01 surtax on personal holding companies for the year 1934 and $1,649.22 interest on said sur-

tax. Such surtax was imposed by the Commissioner of Internal Revenue by virtue of the failure of plaintiff to distribute to its stockholders the alleged net income realized by plaintiff as a result of the capital gain reported by plaintiff in its amended federal corporation income and excess profits tax return [29] for the calendar year 1934 resulting from the disposition by plaintiff of the certificates of deposit covering $136,000.00 principal amount of bonds of Whitney Estate Company, and also the income realized by plaintiff as a result of a capital gain of $27,555.58 resulting from a separate and independent transaction.

XV.

The correct net income of plaintiff for the calendar year 1934 was the sum of $34,724.64 and the Federal corporation income and excess profits taxes and surtax on personal holding companies properly payable by plaintiff on said net income were as follows, to-wit:

Income Tax	$4,774.64
Excess Profits Tax	979.99
Surtax on Personal Holding Companies	4,545.16
	$10,299.79

Accordingly, there was erroneously and illegally assessed and collected from plaintiff by John V. Lewis, Collector of Internal Revenue for the First District of California, the total sum of $21,031.35, consisting of the following amounts:

Federal corporation income and excess profits taxes and surtax on personal holding companies	$19,198.04
Interest paid December 31, 1936	1,649.22
Interest paid December 28, 1935	184.09
	$21,031.35

XVI.

Within the time and in the manner and form provided by law, plaintiff duly and regularly filed with the Commissioner of Internal Revenue its claim for refund of the sum of $30,787.78 [30] as and for Federal corporation income and excess profits taxes and surtax on personal holding companies. In said claim for refund plaintiff relied upon the grounds set forth in the complaint filed herein. The Commissioner of Internal Revenue has neither allowed said claim for refund nor has he mailed to plaintiff by registered mail a notice of disallowance of said claim or any part thereof. More than six months have elapsed between the date of the filing of said claim for refund and the date of the filing of the complaint in the above entitled action.

XVII.

No part of the sum of $21,031.35 illegally assessed and collected from plaintiff as aforesaid, or any interest on said sum, has been repaid or refunded and the whole thereof, to-wit: the sum of $21,-031.35, with interest on the sum of $16,972.23 from December 31, 1936, at the rate of 6% per annum as provided by law, and interest on the sum of $4,-

059.12 from December 28, 1935, at the rate of 6% per annum as provided by law is now due and owing from defendant to plaintiff.

XVIII.

No assignment or transfer of the claim which is the subject matter of this action has ever been made and plaintiff is the sole owner thereof. Plaintiff is justly entitled to the amount set forth in paragraph XVII hereof.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts found, the Court determines:

(1) That plaintiff, Santa Inez Company, a corporation, is entitled to have and recover of and from the United States of America, defendant, the sum of $21,031.35, with interest on the [31] sum of $16,972.23 at the rate of 6% per annum from the 31st day of December, 1936, to a date preceding the date of the refund check by not more than thirty days, and with interest on the sum of $4,-059.12 at the rate of 6% per annum from the 28th day of December, 1935, to a date preceding the date of the refund check by not more than thirty days.

(2) That plaintiff have and recover its costs of suit herein expended, taxed at the sum of $..............

Let judgment be entered accordingly.

Dated this 18th day of November 1942.

CLAUDE McCOLLOCH
United States District Judge.

[Endorsed]: Filed Nov. 18, 1942. [32]

In the United States District Court
For the Northern District of California,
Southern Division

No. 21785-L

SANTA INEZ COMPANY, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 10th day of July, 1942, before the above entitled Court, Honorable Claude McColloch, Judge, presiding, without a jury, a jury having been waived; Willard L. Ellis, Esquire, appearing as attorney for plaintiff, and Frank J. Hennessy, Esquire, United States Attorney, and Miss Esther B. Phillips, Assistant United States Attorney, appearing as attorneys for defendant; and oral and documentary evidence having been introduced, and the cause having been submitted to the Court for decision, and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and ordered that judgment be entered in accordance with said findings;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed [33] that plaintiff, Santa Inez Company, a corporation, shall have and recover judgment against the United States of America, de-

fendant, for the sum of $21,031.35, with interest on the sum of $16,972.23 at the rate of 6% per annum, from the 31st day of December, 1936, to a date preceding the date of the refund check by not more than thirty days, and with interest on the sum of $4,059.12 at the rate of 6% Per annum from the 28th day of December, 1935, to a date preceding the date of the refund check by not more than thirty days.

It Is Further Ordered, Adjudged and Decreed that plaintiff do have and recover from defendant its costs of suit herein expended, taxed at the sum of $.............................

Judgment entered this 18th day of November 1942.

CLAUDE McCOLLOCH
District Judge

[Endorsed]: Filed Nov. 18, 1942. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now comes the defendant above-named, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered by the United States District Court for the Northern District of California in favor

of the plaintiff against the defendant on November 18, 1942, in the above-entitled case.

Dated: February 16, 1943.

FRANK J. HENNESSY
United States Attorney,
ESTHER B. PHILLIPS
Assistant United States Attorney.

[Endorsed]: Filed Feb. 16, 1943. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY DEFENDANT

The defendant having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court for the Northern District of California, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

That the District Court erred in rendering judgment for plaintiff in that said judgment is contrary to the facts found by the Court.

II.

That the District Court erred in that portion of its finding of fact numbered XI, to-wit, that plaintiff realized [36] no gain or loss as a result of the purchase by the Committee on February 28, 1934,

for the benefit of the depositing bondholders of the property which was subject to the mortgage securing the bonds of Whitney Estate Company.

III.

That the District Court erred in that portion of its finding of fact numbered XIII, to-wit, that in said amended return plaintiff erroneously reported and included as gross income the sum of $44,907.70 as capital gain resulting from the disposition by the plaintiff of the certificates of deposit covering $136,000, principal amount of bonds of Whitney Estate Company; such capital gain was determined by subtracting the sum of $59,421.25 (representing the cost of said bonds to plaintiff) from the sum of $104,328.95 (representing plaintiff's pro rata share of the fair market value as of the date of the trustee's sale of the property, which was subject to the mortgage securing the bonds of Whitney Estate Company and which was purchased by the Committee for the benefit of the depositing bondholders.)

IV.

That the District Court erred in that portion of its finding of fact numbered XV, to-wit, that the correct net income of the plaintiff for the calendar year 1934, was the sum of $34,724.64 (instead of the sum of $44,907.70, as reported in said amended return of income and excess-profits tax for the calendar year 1934 as a capital gain resulting from the disposition by plaintiff of the certificates of deposit covering $136,000, principal amount of bonds of Whitney Estate Company), and holding

that the sum of $21,031.35, income tax and interest for said year and based thereon, was erroneously and illegally assessed and collected from the plaintiff by [37] John V. Lewis, former Collector of Internal Revenue.

V.

That the District Court erred in failing to find as a fact and conclude as a matter of law that the transaction and purchase by the (Bondholders Protective) Committee on February 28, 1934 for the benefit of the depositing bondholders of the property which was subject to the mortgage securing the bonds of Whitney Estate Company, was a sale or exchange of property taxable under the provisions of Section 112 (a) of the Revenue Act of 1934.

VI.

That the District Court erred in failing to find and conclude as a matter of law that the foreclosure sale on February 28, 1934 was a separate and distinct transaction from the subsequent transfer of the property to a new corporation and was therefore not controlled by the provisions of Section 112 (b)(5) of the Revenue Act of 1934.

VII.

That the District Court erred in failing to find and conclude as a matter of law that since the gain upon which plaintiff was taxed, namely, the sale on February 28, 1934, was a transaction which was separate and distinct from and anterior to the exchange by plaintiff on December 10, 1934, it must

be recognized under the general rule of Section 112 (a) of the Revenue Act of 1934.

VIII.

That the District Court erred in failing and refusing to order judgment for the defendant and against the plaintiff.

FRANK J. HENNESSY
United States Attorney,
ESTHER B. PHILLIPS
Assistant United States Attorney.

(Receipt of Service.)

[Endorsed]: Filed May 7, 1943. [38]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant above named having taken an appeal from the judgment entered herein on November 18, 1942, to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

(1) The Complaint;

(2) The Answer;

(3) The transcript of testimony taken upon the trial of the case;

(3) All exhibits received in evidence upon the trial of said case;

(5) Memorandum Order of the Court for Judgment for Plaintiff upon Findings; [39]
(6) Findings of Fact and Conclusions of Law;
(7) The Judgment;
(8) Notice of Appeal Filed February 16, 1943;
(9) Statement of the Points intended to be relied upon by defendant in this appeal;
(10) This designation of the record on appeal;
(11) All orders extending the time to docket the record on appeal.

FRANK J. HENNESSY
United States Attorney,
ESTHER B. PHILLIPS
Assistant United States Attorney.

(Receipt of Service.)

[Endorsed]: Filed May 7, 1943. [40]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF TRANSCRIPT.

It is Hereby Ordered that the Clerk of the United States District Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the original transcript of the testimony received on the trial of the above-entitled case for use as a part of the record on appeal of said case.

Dated: July 19th 1943.

MICHAEL J. ROCHE
United States District Judge.

[Endorsed]: Filed July 19, 1943. [41]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

It Is Hereby Ordered that the Clerk of the United States District Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit all of the original exhibits offered and received in evidence in the trial of the above-entitled case for use as a part of the record on appeal to the United States Circuit Court of Appeals in this case.

Dated: May 7, 1943.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed May 7, 1943. [42]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING RECORD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Upon application of Frank J. Hennessy, United States Attorney for the Northern District of Cali-

fornia, appearing by Esther B. Phillips, Assistant United States Attorney, it is Hereby Ordered that the United States of America may have to and including April 16, 1943, in which to docket its record on appeal in the above entitled case.

Dated: March 25, 1943.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Mar. 25, 1943. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING RECORD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Upon application of Frank J. Hennessy, United States Attorney for the Northern District of California, appearing by Esther B. Phillips, Assistant United States Attorney, it is Hereby Ordered that the United States of America may have to and including May 17, 1943, in which to docket its record on appeal in the above entitled case.

Dated: April 14th 1943.

LOUIS E. GOODMAN
United States District Judge.

[Endorsed]: Filed Apr. 14, 1943. [44]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

Upon application of Frank J. Hennessy, United States Attorney for the Northern District of California, appearing for the Appellant above-named, it is Hereby Ordered that the Appellant may have to and including June 1, 1943, in which to docket its record on appeal in the above-entitled case.

Dated: May 11, 1943.

FRANCIS A. GARRECHT
United States Circuit Judge.

A True Copy.
Attest: May 12, 1943
(Seal) PAUL P. O'BRIEN
Clerk.

[Endorsed]: Filed May 12, 1943. Paul P. O'Brien, Clerk.

[Endorsed]: Filed, May 12, 1943, Walter B. Maling, Clerk. [45]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10499

UNITED STATES OF AMERICA,

Appellant,

vs.

SANTA INEZ COMPANY, a corporation,

Appellee.

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

Upon application of Frank J. Hennessy, United States Attorney for the Northern District of California, appearing for the appellant above named, it is Hereby Ordered that the appellant may have to and including July 1, 1943, in which to docket its record on appeal in the above entitled case.

Dated: June 1, 1943.

CURTIS D. WILBUR.

United States Circuit Judge.

A True Copy,

Attest, June 1, 1943.

(Seal) PAUL P. O'BRIEN

Clerk.

[Endorsed]: Filed June 1, 1943, Paul P. O'Brien, Clerk. [46]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

Upon application of Frank J. Hennessy, United States Attorney for the Northern District of California, appearing for the appellant above named, it is Hereby Ordered that the appellant may have to and including August 2, 1943, in which to docket its record on appeal in the above entitled case.

Dated: June 29, 1943.

FRANCIS A. GARRECHT
United States Circuit Judge.

A True Copy,
Attest. June 29, 1943.
(Seal) PAUL P. O'BRIEN
Clerk.

[Endorsed]: Filed June 29, 1943. Paul P. O'Brien, Clerk. [47]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 47 pages, numbered from 1 to 47, inclusive, together with one Volume of the Reporter's Transcript contain a full, true, and correct transcript of the rec-

ords and proceedings in the case of Santa Inez Company, a Corp., Plaintiff, vs. United States of America, Defendant. No. 21785-L., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six-dollars and eighty-cents ($6.80) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 19th day of July A. D. 1943.

(Seal) C. W. CALBREATH
Clerk
WM. J. CROSBY
Deputy Clerk. [48]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 21785-L

SANTA INEZ COMPANY, a corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Counsel Appearing:

For Plaintiff:

WILLARD L. ELLIS, Esq.

For Defendant:

ESTHER B. PHILLIPS, Assistant U. S. Attorney.

Friday, July 10, 1942.

Before: Hon. Claude McCulloch, Judge.

TESTIMONY

Mr. Ellis: I will have to enter an appearance, as Mr. Altman, who was the attorney of record, has died.

The Court: Very well.

Mr. Ellis: If your Honor please, I don't know whether your Honor has read the proceedings in this case.

The Court: Yes, I have.

Mr. Ellis: Your Honor will note that in the complaint we refer to two different corporate re-

8

organizations, one of them relating to Sacramento Medico-Dental Building Company, and the other the Whitney Estate Company. We have decided to abandon the issue relative to the Sacramento Medico-Dental reorganization. Consequently, this case will be confined to the issue relating to the Whitney reorganization. That involves the elimination of [1*] paragraphs 4 to 11, inclusive, of the complaint, and I imagine that it would probably be advisable to have the complaint deemed to be amended on its face by striking all the allegations of paragraphs 4 to 11, inclusive. In that event, it won't be necessary for the Court to make any findings with respect to those allegations.

The Court: So understood.

Mr. Ellis: Did your Honor grant the motion?

The Court: Yes.

Miss Phillips: Yes, that is agreeable. I would suggest it might be simpler if the Court, in the findings, make a finding that counsel abandoned that much and then we won't need to bother about ....

The Court: It may stand like that as it is being recorded right here; the statements go into the record. We are just trying the one transaction now?

Mr. Ellis: Yes, your Honor. In our complaint we allege that the transaction involving the Whitney Estate Company bonds viewed in its entirety resulted in a tax-free exchange. In other words,

* Page numbering appearing at top of page of original Reporter's Transcript.

Santa Inez Company owned certain bonds of Whitney Estate Company. There was a foreclosure, a sale, an acquisition of the property by depositing bondholders. The property was turned over subsequently to a company, a new corporation, in exchange for stock of the new corporation, and it is our contention that viewing the transaction in its entirety Santa Inez Company did not realize any gain upon the distribution of the bonds of Whitney Estate Company in 1934, but that it merely acquired new securities, and until the new securities were disposed of there was neither gain nor loss to be realized. We allege in the complaint the transaction was tax free either as a reorganiza- [2] tion or else as a tax-free exchange under the provisions of section 112 (b) (5) of the Revenue Act of 1934. Our contention is that a corporate reorganization was not effected and that the exchange was tax free under section 112 (b) (5) of the Revenue Act of 1934. That is the only contention I am making. My theory is, and there are decisions to support it, that the bondholders even before the foreclosure sale, because of insolvency of the corporation, were the equitable owners of the property, and that they transferred that property to a new corporation solely in exchange for the new corporation's stock, and that under the Revenue Act referred to, and by reason of the fact the bondholders were in control of the new corporation, I say this exchange was tax free.

Your Honor will note there are certain allegations in the complaint that have been admitted in

the answer, formal allegations such as the method of keeping books, filing returns, ownership of the real estate of Whitney Estate Company, the issuance of the bonds, the amount outstanding on the date of default, the default, itself, the formation of the bondholders committee, the depositing of bonds with the committee, and the sale of the property; also the formal allegation relating to the filing of the claim for refund, and disallowance of the claim. Therefore, our proof will be shortened substantially by the admissions in the answer.

Have you any statement to make, Miss Phillips?

Miss Phillips: I don't know that I can add very much to counsel's statement. The whole matter involving a tax-free reorganization is a complicated one. The reorganization provisions of the taxing statutes cover every taxable phase of a reorganization of a corporation. It is intended that the [3] exchange of securities be taxed, that the transfer of the corporate assets be covered.

The Court: You heard what Mr. Ellis said about the statute that he is relying on?

Miss Phillips: Yes.

The Court: Does that apply on reorganizations, as such?

Miss Phillips: I think so, your Honor. That is involved in the provisions of the statute as to whether, as a tax-free situation, there is an interrelation there, or a correlation of a tax-free exchange that takes place. Then you might say that the tax basis in the new securities continues just the same as the old if such were the case. If A buys

a bond in 1900 at a certain price, and sometime between 1900 and 1942, or say in the last ten years, there was an exchange which is tax free, then that 1900 basis carries over until he disposes of the new securities. If, however, there is not a tax-free exchange on reorganizations, then at the time the new security is received by the transferee, at that time taxable gain or loss can occur. It is almost wholly, I think, a question of law and statutory interpretation. I may say that the decisions have certainly added to the perplexity of counsel. There have not been a uniformity of decisions on the point, and I think the present situation will show inconsistencies, you might say, in the holdings of the courts.

I think that is about all I can add. I think the evidence will be largely documentary, and perhaps some additional stipulations.

LLOYD D. HANFORD,

called by the plaintiff; sworn.

Mr. Ellis: Q. Mr. Hanford, you are the general manager of [4] Santa Inez Company, the plaintiff in this action? A. I am.

Q. You are a licensed real estate broker?

A. I am.

Q. How long have you been engaged in the real estate business as a licensed broker?

A. Since about 1923.

Q. Continuously from the date of the formation of the Whitney Estate Company bondholders pro-

(Testimony of Lloyd D. Hanford.)

tective committee, which plaintiff alleges in its complaint and which is admitted was on June 1, 1933, you were a member of that committee?

A. I was.

Q. Your name, Mr. Hanford, was formerly Lloyd D. Hirschfeld? A. Yes.

Q. And it was legally changed by court hearing last year to Lloyd D. Hanford? A. Yes.

Q. So you are Mr. Hirschfeld who was a member of the bondholders committee of the Whitney Estate Company? A. That is correct.

Q. The office building on the property on Geary street that was covered by this Whitney Estate Company bond issue was known as the Whitney Building at one time, wasn't it? A. Yes.

Q. When I refer to the Whitney Building you know what I am talking about? A. Yes.

Q. I show you a printed copy of a document that is entitled, "The Whitney Estate Company Bondholders' Deposit Agreement," dated April 15, 1933, although upon opening it up it appears it was made as of the 1st day of June, 1933, and ask you whether or not this is a true and correct copy of the original Whitney Estate Company Bondholders' Deposit Agreement? A. Yes, sir.

Q. The original was signed by you as a member of the committee? A. That is correct.

Mr. Ellis: I offer the printed copy of the Whitney Estate Company Bondholders' Deposit Agreement in evidence as Plaintiff's Exhibit 1. [5]

(The document was marked Plaintiff's Exhibit 1.")

(Testimony of Lloyd D. Hanford.)

PLAINTIFF'S EXHIBIT No. 1

THE WHITNEY ESTATE COMPANY
BONDHOLDERS' DEPOSIT AGREEMENT
DATED: APRIL 15, 1933

This Agreement, made as of the first day of June, 1933, by and between Lloyd D. Hirschfeld, Gerald D. Kennedy, Philip Paschel, R. M. Underhill and F. W. Wentworth (hereinafter referred to as the "Committee"), first parties, and such holders of First Mortgage Five and One-half Per Cent Gold Bonds of The Whitney Estate Company as shall become parties to this agreement in the manner hereinafter provided (hereinafter referred to as the "Depositors"), second parties,

Witnesseth:

Whereas, The Whitney Estate Company, a California corporation (hereinafter referred to as the "Mortgagor"), heretofore executed and issued One Million Two Hundred Thousand Dollars ($1,200,000) aggregate principal amount of its First Mortgage Five and One-half Per Cent Gold Bonds (hereinafter referred to as the "bonds") secured by a First Mortgage from the Mortgagor to American Trust Company as Trustee, dated April 15, 1928 (hereinafter referred to as the "Trust Indenture," and the property therein described being hereinafter referred to as the "Trust Property"); and,

Whereas, default has been made in the due observance or performance of certain of the covenants

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

and provisions in said Trust Indenture contained; and,

Whereas, united action and cooperation on the part of the holders of the bonds of the Mortgagor is advisable and necessary in order that their rights and interests may be protected, and such united action and cooperation can best be procured by the means of a Committee, as in this Agreement provided; and,

Whereas, the Committee has consented to represent and to act for the Depositors as hereinafter set forth;

Now Therefore, in consideration of the premises and of the mutual advantages that will arise therefrom, all Depositors, each for himself, but not for the others, or any of them, agree with each other and with the Committee and with the Depositary hereinafter appointed, as follows:

Article I.

Deposit of Bonds and Issuance of Certificates of Deposit

Section 1. American Trust Company, a corporation organized and existing under and by virtue of the laws of the State of California and having its principal office in the City and County of San Francisco, State of California, is hereby appointed the Depositary under and according to the terms of this Agreement.

Section 2. This Agreement shall be signed by the members of the Committee and one executed

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

copy thereof shall be filed with the Depositary at its said principal office. The holder of any of said bonds may deposit the same, together with the interest coupons appertaining thereto, in negotiable form, with the Depositary at its principal office, and shall receive from the Depositary a transferable Certificate of Deposit (said Certificate of Deposit being sometimes hereinafter referred to as "Certificates") substantially in the following form:

"Certificate of Deposit
for
The Whitney Estate Company

First Mortgage Five and One-half Per Cent
Gold Bonds.

No.......... $................
Principal Amount.

Lloyd D. Hirschfeld, Gerald D. Kennedy, Philip Paschel, R. M. Underhill and F. W. Wentworth, as the Committee named in The Whitney Estate Company Bondholders' Deposit Agreement hereinafter referred to, hereby certify that they have received from .... whose address is ...., ... Dollars ($..........) aggregate principal amount of The Whitney Estate Company First Mortgage Five and One-half Per Cent Gold Bonds, bearing the serial numbers and of the denominations set forth on the reverse hereof,

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

issued under a First Mortgage from The Whitney Estate Company to American Trust Company, as Trustee, dated April 15, 1928, with coupons due April 15, 1933, and all subsequent coupons, attached to or accompanying the same, which bonds are deposited subject to and for the uses and purposes stated in the so-called The Whitney Estate Company Bondholders' Deposit Agreement, dated April 15, 1933, between Lloyd D. Hirschfeld, Gerald D. Kennedy, Philip Paschel, R. M. Underhill and F. W. Wentworth, as a Committee, first parties, and such Depositors of said bonds as may become parties thereto, second parties. Said Depositor and each successive holder of this certificate by acceptance hereof, assents to and agrees to be bound by the terms of said agreement, and to such action as may be taken by said Committee pursuant to said agreement, in the same manner and with the same effect as if he had executed the same. The interest represented hereby is assignable by transfer on the books kept for that purpose by American Trust Company, the Depositary named in said agreement, by the holder hereof in person or by agent, upon the surrender to said Depositary of this certificate properly endorsed, with the endorsement guaranteed by a bank or trust company, satisfactory to said Depositary, such transfer being subject to all the terms and conditions of said agreement. This certificate shall not be valid

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

for any purpose unless it is countersigned by said Depositary.

Dated: ...., 1933.

....
....
....
....
....
Committee.

Countersigned:
AMERICAN TRUST COMPANY
as Depositary
By ....
Assistant Secretary.
By ....
Assistant Trust Officer.

(On reverse of Deposit Certificate)

THE WHITNEY ESTATE COMPANY

First Mortgage Five and One-half Per cent Gold Bonds deposited:

No.........	to..........	Inc. Denomination $..........	Total $..........
....	....	....	....
....	....	....	....
....	....	....	....
....	....	....	....

Assignment.

No transfer is valid unless noted on the books of the Depositary.

The undersigned, holder of this certificate, and the

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

owner of the bonds represented thereby, hereby for value sells, assigns and transfers unto.............
....
the within certificate and all rights and interest represented thereby, and does hereby irrevocably constitute and appoint..........................
agent of the undersigned to transfer said certificate on the books of the Depositary herein named with full power of substitution in the premises.

....
(Signature of Owner)

Dated: ...., 19....

In the presence of

....
Witness.

(To be printed only on Duplicates of Certificates of Deposit)

Received the original Certificate of Deposit of which the foregoing is a duplicate from American Trust Company, as Depositary, this ....
day of ...., 19....

....
Bondholder or Registered Owner."

The Depositary shall, on the Committee's written direction (which may be given or withheld, either generally or in special instances, in the discretion of the Committee), accept:

1. Bonds which are not accompanied by any or

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

some of the unpaid coupons appertaining thereto; and/or

2. Coupons appertaining to any of said bonds apart from the bonds to which the coupons appertain;

and shall issue to the Depositors thereof, Certificates of Deposit which shall be substantially in the form and substance of that hereinbefore set out, adjusted, however to show the bonds and/or particular coupons actually deposited and received.

All such bonds and/or coupons so deposited shall be received by the Depositary on behalf of the Committee and be held subject to the sole control, direction and disposition of the Committee under the terms and provisions of this Agreement; and each holder of such bonds and/or coupons shall, upon so depositing the same, become a party to and be bound by all the terms and provisions of this Agreement, in the same manner and with the same effect as if he had personally signed this Agreement.

At the time of making the deposit of any bonds and/or coupons hereunder, each Depositor shall furnish to the Depositary, in writing, his post office address and from time to time thereafter shall notify such Depositary in writing of any change in such address. Such address or any change therein, written notice of which is given by the depositor to the Depositary prior to the mailing or sending of any notice or any other document or the distribution of any securities, shall be con-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

clusively deemed the correct mailing address of such Depositor for the mailing or sending of such notice, document or securities. Certificates of Deposit, stock certificates, bonds, notes, checks and any other securities which at any time may be issuable or distributable to the Depositor by the Depositary receiving said bonds and/or coupons may be mailed to him by such Depositary at his address appearing on the books of such Depositary, but such mailing shall be at the Depositor's risk.

Section 3. Said Certificates shall be registered in books kept by the Depositary for that purpose. No transfer (other than by operation of law) of any Certificate shall be valid unless made on said books by authorization of the registered holder in the manner provided herein and in said Certificate. Such transfer shall be recorded in the books of the Depositary and, upon surrender of the Certificate transferred, a new certificate therefor shall be issued to the transferee. In the event any Certificate shall be transferred prior to the date on which the Committee shall elect to take title to the deposited bonds as herein provided, such transfer of any Certificate shall be deemed to effect a sale and assignment to the transferee of such Certificate of the title to the deposited bonds and coupons for which such Certificate was issued. Any person presenting evidence satisfactory to the Depositary and the Committee that he has become entitled to any Certificate in consequence of the

(Testimony of Lloyd D. Hanford.)

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death, bankruptcy or insolvency of the holder of such Certificate, or in any way other than by transfer in accordance with the requirements of the preceding part of this Section 3, shall be recorded in the books of the Depositary as the holder of such Certificate and receive a new Certificate upon the delivery of the existing one to the Depositary. If a Certificate shall be lost, stolen, mutilated or destroyed, the Depositary may in its discretion issue a duplicate Certificate upon evidence of such fact, satisfactory to it and the Committee, and receipt of a bond of indemnity satisfactory to the Depositary and the Committee, and surrender of the existing Certificate, if mutilated. Upon any reissuance or issuance upon loss, theft, mutilation or destruction of any Certificate, the holder thereof shall pay to the Depositary any expenses involved in such service and shall further pay such fee as the Depositary shall deem reasonable. The person in whose name any Certificate shall be issued, or the transferee thereof, shall be entitled to all the benefits and shall be subject to all the obligations of a Depositor hereunder, in the same manner and with the same effect as though such person or transferee had originally deposited the bonds and/or coupons represented by such Certificate and with like effect as if this Agreement had been signed by him in person. The terms "Depositor" and "Depositors", whenever hereinafter used, shall include not only the original Depositor or Depositors,

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

but as well the registered holder or holders at any time of any Certificate by the transfer thereof. The Committee and the Depositary may treat the registered holder, for the time being, of each Certificate of Deposit, or when presented duly endorsed in blank by such registered holder, the bearer of such Certificate, as the absolute owner thereof and of all the rights and interest of the original Depositor of the bonds and/or coupons in respect to which the same was issued, and neither the Depositary nor the Committee shall be bound or be affected by any notice to the contrary or of any trust, whether express, implied or constructive, or of any charge or equity respecting the title or ownership of such Certificate or of the bonds and/or coupons represented thereby.

Section 4. The Committee in its discretion may fix or may limit the period or periods within which holders may deposit their bonds and/or coupons and within which they may become parties to this Agreement, and, in its discretion, either generally or in special instances, may extend or renew the period or periods so fixed or limited for such further periods and upon such terms and conditions as the Committee may see fit. Holders of bonds and/or coupons not so deposited within such period or periods will not be entitled to deposit the same, or to become parties to this Agreement, or to share in the benefits hereof, and shall acquire no rights hereunder, except upon obtaining the express

(Testimony of Lloyd D. Hanford.)

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consent of the Committee as in this Section provided. At any time and upon such terms as it may deem proper from time to time, the Committee may direct that the Depositary accept from any Depositor the surrender of any Certificates issued hereunder, and, upon receipt thereof and in exchange therefor, surrender and deliver the securities represented thereby or anything then held by the Depositary and/or the Committee in lieu thereof.

Section 5. The Depositary is fully authorized and empowered to transfer and deliver and dispose of any and all of such bonds and/or coupons deposited hereunder, in accordance with the written order or orders from time to time of the Committee, and all such orders shall be good and valid if signed by a majority of the Committee as it is from time to time constituted, or certified to the Depositary as having been so signed or adopted as provided in Article VIII hereof. The Depositary shall, at all times, be free from all liability and responsibility in dealing with or disposing of bonds and/or coupons deposited hereunder, as directed by the Committee.

Article II.

Personnel and Duties of the Committee.

Section 1. Said parties of the first part their survivors and successors, shall be and are hereby appointed and constituted the Committee, subject to the terms hereof, so long as they shall continue to act. They shall elect a Chairman of said Com-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

mittee, who shall be a member thereof, provided, however, that the Chairman hereby nominated, as set forth in Article X hereof, shall be and continue to act as such until he shall resign (either from the Committee or from the Chairmanship thereof), die, or be removed as herein provided. In case at any time any member of the Committee shall die, resign, refuse or be unable to act, the vacancy thereby caused shall be filled by the vote of the majority of the remaining members of the Committee. Any member of the Committee may be removed at any time by the vote of all the other members, and any member of the Committee may resign by giving notice of his resignation to the Secretary of the Committee and to the Depositary. The Committee may settle any account or transaction with such removed or resigning member and give him full release and discharge upon such resignation or removal. The Committee, as at any time constituted, and disregarding any vacancy, shall enjoy all the rights, powers, interests and immunities of the Committee as originally constituted. In so far as appropriate to that purpose, the title to deposited bonds and coupons upon the election of the Committee to take such title and to any other property held by the Committee shall (subject to the power of the majority of the Committee to make disposition thereof) be in the nature of a joint tenancy and not a tenancy in common, with survivorship among members of the Committee

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upon the death, resignation or removal of any of them. If requested by the Committee, however, a member shall, upon his resignation or removal, execute instruments releasing to the Committee all his right, title and interest in the property held hereunder. Except where in this Agreement it is expressly stated that powers of or actions by the Committee shall be exercised or taken by a greater proportion or number of members thereof, the Committee may exercise any of the powers or take any action under this Agreement with the assent of a majority of the Committee, which assent may be expressed at a meeting of the Committee, by vote or by resolution of a majority of the members of the Committee, or without a meeting by an instrument or separate concurrent instruments in writing signed by a majority of the members of the Committee. The Committee may adopt its own rules of procedure respecting the taking of Committee action, and, as respects any order given or action taken by the Committee, neither the Depositary, Depositors nor third persons need inquire as to whether such rules were observed, or as to whether the minority of the Committee were notified or apprised of the passing or contemplated passing of any order or the taking or contemplated taking of any action. The membership of the Committee may, by unanimous vote of all the then members, be increased or decreased to such number from time to time as the Committee may decide, and in

(Testimony of Lloyd D. Hanford.)

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case of increase the additional members shall be appointed by the Committee or a majority thereof. Notice of all changes in the addresses or in the membership of the Committee and in the offices of Chairman and Secretary of the Committee shall be filed with the Depositary by the Secretary and such filing shall bind all parties hereto. Any member of the Committee may vote or act by proxy (which proxy may, but need not be, another member of the Committee and may be appointed in writing or by telegraph, radio or cable) and the vote or act of such proxy shall be as effective as the vote or act of the member appointing such proxy.

Section 2. The Committee may select, employ and dismiss in and about the exercise of any of its powers, a secretary and an assistant secretary or assistant secretaries (who may, but need not be, members of the Committee) and such other officers, counsel, engineers, accountants, appraisers, superintendents, laborers, agents or employees in such manner and at such times as it may deem advisable. The Secretary hereby nominated, as set forth in Article X hereof, shall continue as such until his resignation, death, or removal by the Committee.

The Committee may hold its meetings at such times and places and upon such notice as it may at any time determine and establish by vote, resolution or otherwise. The Committee shall keep and maintain a record of its proceedings and actions in such form as it shall determine.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

Section 3. The Committee is authorized and empowered to construe this Agreement and its construction made in good faith shall be conclusive and final upon all of the parties hereto. The Committee may remedy defects and supply omissions in this Agreement and may make such modifications as in its judgment may be deemed necessary or proper to carry out the same properly and effectively, and its judgment as to expediency or necessity shall be final.

Section 4. Unless this Agreement shall be terminated within a period of one (1) year from the date hereof, the members of the Committee shall be entitled to receive for the usual and ordinary services of the Committee compensation aggregating for all of the members of the Committee an amount not exceeding one-half of one per cent of the principal amount of the deposited bonds. The Committee shall be entitled to be reimbursed and indemnified for its compensation and for all advances made by and/or to the Committee and/or for all expenses, indebtedness, obligations or liabilities incurred by it or by its counsel, officers, agents, servants, attorneys and representatives in carrying out the powers and duties hereby vested in the Committee, including any stamp or transfer taxes levied or imposed by any governmental authority, by reason of the deposit, sale, transfer or assignment of bonds or any other securities issued in pursuance of any plan adopted by the Committee.

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The Committee shall be entitled to hold and resort to the deposited bonds and/or coupons and any property which it may purchase, acquire or receive and which may come into its hands, for the compensation, disbursements and expenses of the Committee and of the members thereof, (including the compensation and expenses of the Depositary and of such counsel, attorneys, secretaries, managers, experts, engineers, accountants, appraisers, superintendents, mechanics, operators, laborers, agents and employees as it and/or the Depositary may employ) in accordance with the provisions hereinbefore set forth, and for any and all indebtedness, obligations or liabilities incurred by the Committee. Holders of Certificates shall not be personally liable for such compensation, charges and expenses or for such indebtedness, obligations or liabilities, and there shall be no personal liability on the part of such holders for any action taken or expenses incurred by the Committee, but the Committee shall look solely to the security of the deposited bonds and/or coupons and all property subject hereto for the payment of such compensation, charges, expenses, indebtedness, obligations and/or liabilities.

Section 5. The Committee as a committee, the members thereof as individuals, any firm or company with which any of the members of the Committee shall be associated, the Depositary, or any of its agents or officers, either separately or with each other, may deposit bonds and/or coupons under

(Testimony of Lloyd D. Hanford.)

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this Agreement, and shall have the same rights and be subject to the same liabilities in respect thereto as other Depositors; and/or may become pecuniarily interested (as pledgee, purchaser, seller, underwriters, or otherwise) in the property, securities or matters referred to in or connected with this Agreement or with any plan and/or agreement of reorganization or readjustment which the Committee and/or the Depositors may adopt or approve as hereinafter provided, or otherwise, or in any property, securities or matters in or with which the Mortgagor may be directly or indirectly interested or concerned, and in this regard the Committee as a committee, the members thereof as individuals, any firm or company with which any of the members of the Committee shall be associated, and the Depositary and its officers and agents, shall be as free to act as if this Agreement had not been entered into. Any member of the Committee may become an officer, director, stockholder or employee of any corporation, trust or association organized pursuant to the provisions of this Agreement; and the Depositary and/or any member of the Committee may be appointed or act as trustee under any mortgage, indenture or agreement created or entered into in connection with any plan of reorganization or readjustment adopted pursuant to the provisions of this Agreement or otherwise, and may act as transfer agent, registrar or otherwise, in any manner in respect to any securities

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issued pursuant to the provisions of any plan of reorganization or readjustment so adopted.

The Committee shall have and it hereby is given the right to co-operate with such other committees as are or may hereafter be organized to represent other interests connected with or pertaining to the Trust Property or the Mortgagor, and the said Committee shall have the right to act (by its Chairman or by any member of the Committee or other representative or representatives appointed by it) in conjunction with said Committees. The members of the Committee or any of them may become members of and/or may constitute any such other Committee.

Article III.

Powers of the Committee.

Section 1. The Depositors, severally and respectively, do hereby agree that all bonds deposited by them with the Depositary hereunder shall be held and disposed of by the Committee under and subject to the terms and conditions of this Agreement, including the following:

Title to bonds deposited hereunder shall not pass to the Committee or its nominee or nominees, and the endorsement or assignment or transfer of such bonds shall not become effective for such purpose unless and until the Committee shall cause to be filed with the Depositary for such bonds a certified copy of a resolution adopted by the Com-

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mittee determining to accept the transfer to it or its nominee or nominees of the deposited bonds described or referred to in such resolution, and until the Committee shall have caused, on behalf of the Depositors, owners thereof, the necessary transfer tax stamps to be affixed to the transfer or assignment of the deposited bonds described or referred to in such resolution, and cancelled. Immediately upon the filing, as aforesaid, of a certified copy of such resolution and the affixing and cancellation of such stamps, the title to each and every deposited bond described or referred to in such resolution shall pass to and vest in the Committee or its nominee or nominees. The Committee may at any time or times cause the title to any or all of such deposited bonds to pass to and vest in the Committee or its nominee or nominees as hereinbefore provided; and the Committee or its nominee or nominees shall thereupon be vested with the legal and equitable title to such bonds to the same extent as if it or they were the absolute owner or owners thereof, and the Depositors hereby consent to the assignment and transfer thereof to the Committee, its successors and assigns, or its nominee or nominees. Transfer tax stamps upon deposited bonds required because of any transfer of title to the Committee or to its nominee or nominees shall be an expense of the Committee.

Each Depositor agrees to execute and deliver to the Committee or to its nominee or nominees at

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

any time, upon its request, any and all instruments of transfer, assignment, powers of attorney and other instruments, necessary or desirable in the opinion of the Committee to vest or confirm in it or its nominee or nominees the title to said bonds and to enable it fully to carry out this Agreement. All deposited bonds, whether or not title thereto shall have passed to the Committee or its nominee or nominees, shall be held by the Depositary for the account, under the control and at the order of the Committee, subject only to the terms and conditions hereof; and the Committee or its nominee or nominees may use or cause to be transferred and delivered or surrender any such bonds and receive, or cause to be delivered in exchange therefor, new bonds and/or cash and/or securities, in accordance with any Plan adopted or approved by the Committee in the manner hereinafter provided, or any modified or substituted plan. Until the Committee shall have elected to take title to the deposited bonds as herein provided, the Depositors further constitute the Committee as now or at any time hereafter constituted their only and exclusive attorneys and agents for the purpose of carrying out this Deposit Agreement and constitute and appoint the Committee, the lawful attorneys of them and each of them, irrevocably, to execute in their behalf such instruments in writing and to do all such acts and things as to said Committee may seem proper to protect or promote the rights of the

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

Depositors. Any and all action of the Committee with respect to deposited bonds, prior to the date on which the Committee elects to take title to the deposited bonds, shall be as the irrevocable agent and attorney-in-fact of the Depositors.

The Committee shall have and may exercise, in its discretion, and either prior to or subsequent to the election of the Committee to take title to deposited bonds and coupons, all the rights and powers of the respective owners or holders of said bonds and/or coupons deposited hereunder; and without in any manner limiting the other provisions hereof and the power and authority vested in the Committee through the sale and transfer to it of the deposited bonds and/or coupons, it is further agreed by the Depositors that the Committee shall be fully authorized, in its discretion:

(a) To attend either in person or by proxy all meetings of bondholders or creditors of the Mortgagor, and as the holders and owners of said bonds and/or coupons or as the agent and attorney-in-fact of the Depositors, as the case may be, to vote upon all questions which may arise at such meetings, and also as such holders and owners to consent either in writing or otherwise in respect to any and all matters;

(b) To consent or agree to or to make any changes, modifications, alterations or amendments in any or all of the terms, covenants or provisions of said Trust Indenture, as may to the Committee

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seem advisable, and to execute and/or assent to the execution of all instruments convenient or necessary thereto; and to consent to and/or to extend the time of payment of any of such bonds and/or coupons for such period or periods as the Committee may deem advisable;

(c) To elect to have the principal of the bonds declared due and payable forthwith or otherwise and to request the Trustee under said Trust Indenture so to do, and to withdraw any such election; to declare said bonds due and to withdraw any such declaration, all as provided in said Trust Indenture; and to waive or suspend any default in the bonds and/or coupons or under said Trust Indenture or in any other bonds, notes, securities or claims at any time held hereunder; and to ratify any action heretofore or hereafter taken by the Trustee under said Trust Indenture; and to pay or consent to the payment of said bonds and/or coupons and/or of any claims against the Mortgagor whether or not such claims are secured by a lien prior to said bonds and/or coupons; and to make such requests upon or give such directions to the Trustee under the said Trust Indenture as are expressly or impliedly provided for therein;

(d) To enter upon and to take possession of the Trust Property or any part thereof and to lease all or any part thereof upon such terms and for such periods as the Committee, in its absolute discretion, may determine, and/or to operate

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and use the same, and for the purposes of said operation to employ and discharge and direct all managers, operators, agents, laborers, and employees, and/or to make all contracts or agreements, whether in respect of the purchase of supplies, material or equipment, or otherwise, as the Committee shall deem best for such operation; to take such possession and/or engage in such operation as the agent of the Trustee, to request the Trustee to take such possession and/or engage in such operation and to exercise all other power and authority granted in said Trust Indenture; to request the Trustee in writing, with or without entry, either personally or by attorney, to sell all or any part of the Trust Property; to institute, prosecute or defend, or to intervene in or become a party to, or direct the Trustee under said Trust Indenture to institute, prosecute or defend, or to intervene in or become party to, any suit or proceedings for the foreclosure of said Trust Indenture, or otherwise, and to exercise all other powers and pursue all other remedies provided in said Trust Indenture and/or provided by law, among other things to institute proceedings for foreclosure, sale by Trustee under power of sale, or any special foreclosure, in accordance with the laws of the State of California, or request or direct the Trustee to so do, and to that end, for and on behalf of each and all of the Depositors, to waive a deficiency decree and to so state in the Bill of Equity, Complaint, Petition or other pleading,

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that the Depositors are willing to take and accept the property conveyed, mortgaged and pledged by said Trust Indenture in full satisfaction of the indebtedness secured by said Trust Indenture or to authorize the Trustee to do so; and to apply for and procure, or direct the Trustee under said Trust Indenture to apply for and procure the appointment of a receiver or receivers for all or any part of the Trust Property, or the dismissal of any such receiver or receivers, or the substitution of any such receiver or receivers; to consent to the issuance of receivers' certificates relating to said Trust Property and/or to any other property held by or on behalf of the Committee upon such terms and conditions and with such liens as the Committee may deem necessary or advisable, and to oppose the issuance of such receivers' certificates; to remove or take part in the removal or concur in the resignation of the Trustee and to appoint or take part in appointing its successor or successors;

(e) To institute or cause to be taken or instituted or to intervene in or become a party to or exercise control over such suits, actions, defenses or proceedings, at law, in equity or otherwise, and to give such directions, execute such papers and do such acts, whether under or for or in connection with the foreclosure of said Trust Indenture, or otherwise, as the Committee shall deem judicious or proper in order to protect the security provided by said Trust Indenture, or to procure the payment of

(Testimony of Lloyd D. Hanford.)

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the deposited bonds and/or coupons with interest thereon as therein provided; to deposit or cause the Depositary to deposit any or all of said bonds and/or coupons as exhibits or evidence in any suits, actions or proceedings as required by law, or the ruling of any court, master in chancery or commissioner; and to represent, bind and act for the Depositors in any and all such matters as fully and completely as the Depositors themselves might do;

(f) To institute or cause to be taken or instituted or to intervene in or become a party to such actions or proceedings, enforcing or attempting to enforce any guaranty or guaranties of the payment of the principal of and/or interest on said bonds and/or any other indebtedness secured by said Trust Indenture and/or of the observance or performance of any covenants, agreements or conditions contained in said bonds and/or Trust Indenture or otherwise;

(g) To consent and agree to the sale of part or all of the Trust Property (without regard to whether such sale may or may not be pursuant to judicial or legal proceedings) by the Mortgagor, by the Trustee, or by any receivers of the Trust Property, or of any portion or portions of the property now under said Trust Indenture, free and clear from the lien of said Trust Indenture, at such price or prices and upon such terms and conditions as may to the Committee in its discretion seem best, and to consent to the release by the Trustee under

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said Trust Indenture of any and all of the property covered by said Trust Indenture from the lien thereof and for such consideration as the Committee may fix, with or without compliance with the provisions, if any, contained in said Trust Indenture relative to the release by the Trustee of property covered thereby;

(h) To apply from time to time any and all moneys in the hands of the Committee in the following manner: First, to the discharge or payment of any advances for and costs and expenses of any judicial, legal or other proceedings, and costs, expenses, compensation, or fees of any receivers of the property subject to said Trust Indenture, and of the Trustee under the said Trust Indenture, and of their counsel; the furnishing of indemnity to said Trustee; the payment and/or purchase of receivers' certificates; the acquisition of property and payment of the costs and expenses of operating, rehabilitating and/or improving such property and the Trust Property; and the payment of all indebtedness, obligations, liabilities, charges and expenses and the compensation of the Committee and/or the Depositary and of their counsel, and for any other purposes permitted under the provisions of this Agreement, which the Committee shall agree shall be paid; and Second, to the pro rata payment of the matured and unpaid interest coupons, with interest thereon at the rate therein specified, and the payment of the principal of and accrued inter-

(Testimony of Lloyd D. Hanford.)

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est on all the said bonds then outstanding, without preference of interest over principal or principal over interest; Provided, however, the Committee may alter or vary the order of distribution aforesaid, if required by the terms of said Trust Indenture or for other reasons in the opinion of the Committee requiring such variance;

(i) To consent or agree to the making of any notation or memorandum on the bonds and/or coupons deposited hereunder, evidencing any partial payment thereon or any release of property from the lien of said Trust Indenture, or any other thing done or consented to by said Committee, or any agreement made in regard to such partial payment, release or other thing as to the Committee may seem proper; and in the event of receiving interest on any of the deposited bonds the Committee is authorized to surrender the coupons representing interest thus paid, and may in respect of the collection of such interest execute and deliver all certificates and other instruments and do all further acts necessary or appropriate pursuant to the requirements of the Federal laws and/or any State laws governing income or other taxes;

(j) To do or to be done whatever (including the execution and delivery of proper instruments) the Committee in its sole discretion may deem expedient, necessary or proper to preserve, protect, guard, secure, promote or enforce the rights and interests of the Depositors and in such manner and

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upon such terms as the Committee shall deem expedient; to pay and discharge any or all prior liens (including taxes and assessments), whether the same now exist or hereafter arise, on the property of the Mortgagor, or any part thereof, subject to said Trust Indenture, and/or to liquidate, compromise, settle or discharge any such prior liens or liens and/or taxes and assessments by conveyance of any of the Mortgagor's property to any person, firm or corporation or taxing authority, with or without consideration, or to permit any such property to revert to such taxing authority; and to make any settlement or adjustment with any holder of bonds and/or coupons not depositing the same under this Agreement for the purpose of securing his consent to any action or nonaction contemplated by the Committee or the deposit of the bonds and/or coupons of such holder under this Agreement.

(k) To demand, collect and receipt for all amounts that may be due or owing upon or in respect to the deposited bonds and/or coupons, whether for principal or for interest, or otherwise; and to take or institute or cause to be taken or instituted all such suits, actions or proceedings, whether legal, equitable, in bankruptcy or otherwise, for the recovery of any property or the amount due upon any bonds and/or coupons or other obligations held or owned by said Committee; and to assent to any composition in bankruptcy offered by or on behalf of the Mortgagor or any per-

(Testimony of Lloyd D. Hanford.)

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son having any interest in the Trust Property or any other property acquired or sought to be acquired by the Committee; and to enforce payment of the deposited bonds and/or coupons by proving the same in bankruptcy or otherwise;

(l) To do whatever in the judgment of the Committee may be deemed expedient to promote or procure the sale or exchange and/or purchase of all or any part of the property of the Mortgagor, without regard to whether such property is or is not included in the lien of said Trust Indenture and without regard to whether said sale, exchange and/or purchase is or is not pursuant to judicial proceedings and/or foreclosure and/or Trustee's sale or otherwise; to dissolve or cause the Mortgagor to be dissolved and to purchase such property (the Committee, however, not being obligated to make any such purchase at receiver's sale or other sale incident to said dissolution or winding up of the affairs of the Mortgagor; at any time to purchase or cause to be purchased in its behalf or for its account said property of the Mortgagor or any part thereof, at such prices and on such terms as it may deem expedient so to acquire the same by foreclosure and/or Trustee's sale, or otherwise, and in connection therewith to waive any deficiency judgment (the Committee, however, not being bound to make any such purchase or acquisition), and to purchase, or provide for the purchase of, or acquire, or provide for the acquisition of,

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any such property or any lien thereon or obligations secured by lien thereon or any other property, or thing of use in the judgment of the Committee in promoting the interests of the Depositors; to purchase or provide for the purchase or extension of the maturity of any obligations secured by prior liens upon the property of the Mortgagor or any part thereof covered by said Trust Indenture or to consent to the issuance of new securities secured by a lien on the Trust Property, or any part thereof, prior to the lien of the Trust Indenture herein referred to in an amount sufficient to fund any indebtedness, including taxes and assessments, having or constituting a lien prior to said Trust Indenture or to pay any such prior lien or indebtedness, and sufficient to provide for all expenses (including attorneys' fees) in connection with the issuance of such new securities; and, in the event of a purchase of any property and/or prior lien obligations, the Committee may apply all or any of the deposited bonds and/or coupons and/or any purchased property in payment or in part payment of the purchase price thereof, or may pledge, mortgage or sell all or any part of the purchased property and all or any part of the deposited bonds and/or coupons and any other property, securities, bonds and/or coupons acquired by or on behalf of the Committee, for the purpose of procuring funds for the same and/or such funds as may be necessary to discharge prior liens on the property purchased, or to pay

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the expenses of sale or of the Committee and/or to pay or purchase any receivers' certificates which may be issued in any legal proceedings, and/or for such other purposes as the Committee in its discretion may deem advisable for the best interests of the Depositors;

To make or secure such indemnity and protection to any Title Company as may be required by such company in connection with the issuance of any guaranty or certificate of title or policy of title insurance covering the Trust Property or other property acquired by the Committee, and generally to furnish such indemnity to such persons as the Coupon may deem necessary, and to mortgage, pledge, or sell any of the bonds and/or coupons deposited hereunder or property acquired by or on behalf of the Committee for such purpose; and to pay any premium or charge for the issuance of any title guaranty policy or policies;

(m) To make or secure such indemnity and protection to the Trustee under said Trust Indenture as the Committee may approve against any liability by reason of any action or thing which said Trustee may take or do at the request of the Committee, and to pay any compensation, charges, expenses or disbursements of said Trustee or of the Committee or of the Depositary, and for the purposes aforesaid to pledge, mortgage, or sell any or all of the deposited bonds and/or coupons and any and all se-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

curities, bonds and/or coupons or property acquired by or on behalf of the Committee;

(n) To exercise, assert and enforce as the holders and owners of deposited bonds or as agent and attorney-in-fact of such owners, as the case may be, by legal proceedings or otherwise, in its uncontrolled discretion, any powers vested in or conferred upon by the owners and holders of said bonds and coupons by the terms thereof or under the terms of said Trust Indenture or otherwise, and in general to do such acts as the Committee in its uncontrolled discretion may deem judicious or proper in order to carry out fully and effectively the purposes of this Agreement;

(o) To borrow any sum or sums of money from any person, firms or corporations whatsoever (including the Depositary or any of the members of the Committee individually, or the firms or corporations of which they or any of them may be members, officers, directors or stockholders) at any time or times and for any purpose of this Agreement (including the payment of any compensation, expenses, obligations and liabilities of the Committee) and for the purpose of preserving, protecting, improving and operating the property subject to said Trust Indenture and/or any other property held by the Committee and the integrity of the business relating thereto, and to give any and all bonds of indemnity and other bonds; and for the moneys so borrowed the Committee may give promissory notes

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

therefor, binding the bonds and/or coupons and/or Trust Property and/or other property held by the Depositary or the Committee hereunder, but not the Committee or its members, the Depositary or the Depositors personally; and as security for the payment of any moneys so borrowed and for the performance of the provisions of any such bonds and/or notes and of any obligations of the Committee to charge, by pledge, mortgage and/or otherwise, the deposited bonds and coupons, or any of them, and the Trust Property or any other property purchased, acquired or held by the Committee or any part thereof; and any person or corporation from whom the Committee shall borrow money, as hereinabove provided, may rely conclusively upon the certificate of the Committee executed by the Secretary of the Committee as to the purposes for which any such moneys are borrowed, and no such person or corporation shall be required to see to the application of the moneys so borrowed, or any part thereof. The Committee may direct the Depositary to hold the deposited bonds and coupons and other property, or any designated part thereof, as security for the repayment of any moneys borrowed or to be borrowed by the Committee as hereinabove provided, in which case such bonds and coupons and other property so designated shall be, and shall be held by the Depositary as, security for such loans with the same effect as if they were actually de-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

posited with the person or corporation making such loans as security for the payment thereof;

(p) To negotiate and contract with any persons, firms and corporations for obtaining or for granting powers, rights or facilities, exchanges of property, or any other right which may be deemed necessary or desirable to obtain or grant, and to make contracts therefor, and generally to make and ratify such purchases, contracts, stipulations or arrangements as in its opinion will operate directly or indirectly to aid in the preservation, improvement, development, or protection of the property subject to said Trust Indenture or of any property which the Committee shall acquire or shall have contracted to acquire;

(q) To purchase any securities at such price or prices as it may deem advisable; to exchange the deposited bonds and/or coupons for new securities of the Mortgagor or securities of any other person, corporation, trust or association, which new securities or securities shall bear such date, mature on such date or dates, bear such rate of interest or dividends, and contain such terms, provisions and conditions as the Committee in its uncontrolled discretion may deem judicious or proper, such new securities or securities to be secured or unsecured, and may consist of bonds, notes, debentures and/or stock on such terms as the Committee in its uncontrolled discretion may deem judicious or proper.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

(r) To rescind, alter, modify, enlarge or restrict any contract or agreement entered into, or withdraw any consent given or election made, or dismiss any action or proceedings commenced or caused to be commenced by the Committee under any of the provisions hereof.

(s) To sell the deposited bonds for such price and on such terms as it may deem advisable, provided that no such sale shall be made unless all of the deposited bonds are sold, nor unless such sale and the price and terms thereof shall first have been approved by the written consents of the holders of at least 90% of the deposited bonds filed with the Depositary.

Section 2. No power or authority in this Agreement or in any article, section or sub-section thereof conferred upon or granted to the Committee or the Depositary is intended to be exclusive of any other power or authority (whether or not granted in the same article, section or sub-section) but each and every such power and authority shall be cumulative and shall be in addition to every other power or authority given in this Agreement. No power or authority in this Agreement granted shall be exhausted or impaired by the exercise thereof, but may be exercised again from time to time as occasion arises. Any power or authority in this Agreement granted may in point of time be exercised without regard to the order in which the statement of such power or authority may occur in this Agreement.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

Particularly may all powers or authorities granted in this Agreement be exercised before or after any sale or purchase of any or all of the Trust Property or any property of the Mortgagor or other person or corporation, or the acquisition thereof on foreclosure, Trustee's sale (or otherwise), and before or after or irrespective of the adoption or approval of any plan and agreement of reorganization or readjustment. It is the intention to confer upon the Committee all powers which it may deem necessary or expedient in or towards the furtherance of the general purposes of this Agreement, although such powers be of a character not contemplated at the time of the execution hereof.

In respect of any power granted herein the Committee shall be deemed to have all supplemental powers whereby the granted powers are to be exercised. Without in any manner limiting such supplemental powers, the Committee shall have the power to make investigations, inspections, and inquiries; to consult counsel, experts, and advisers; to make reports to Depositors; to sign, execute and deliver letters, documents, telegrams, notices, requests, covenants, deeds, grants, assignments, indentures, mortgages, deeds of trust, bonds, notes, pledges, leases, releases, and so forth; to sue or defend in courts, whether at law or in equity, or bankruptcy or of claims, or before committees, councils, or commissions or any other governmental agency or agencies; to obtain patents, licenses, trade-marks

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

and leases; and to do all other things which the Committee regards as permitting the more facile, convenient, speedy, or satisfactory exercise of any or all of the powers granted herein.

Article IV.

Plan of Reorganization or Readjustment.

Section 1. The Committee shall have power (but shall not be obligated), either before or after any sale of the Trust Property or acquisition thereof by the Trustee or the Committee on foreclosure, Trustee's sale or otherwise, to make, enter into, or become a party to (either alone or in conjunction with other bondholders, creditors, stockholders, or committees representing them, or otherwise) a plan or agreement of reorganization or readjustment of the property and/or affairs of the Mortgagor, containing such terms and conditions as the Committee may, in its sole discretion, deem proper or advisable, or the Committee may approve and adopt any such plan or agreement though not prepared by it. Such plan or agreement may constitute managers of the reorganization or readjustment under it and provide for their compensation and expenses, and the members of the Committee, or any of them, may act as such managers or may be members of the Committee constituted by such plan.

Such plan or agreement of reorganization or readjustment may be effected (but need not be) by a merger or consolidation of the Mortgagor with any other corporation or corporations, trust or

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

trusts, of may be effected by a sale and/or the transfer of the Trust Property or other property of the Mortgagor to any person or persons, corporation or corporations, trust or trusts, or by an exchange of the deposited bonds and/or coupons for other bonds, securities and/or stocks.

Upon the approval and/or adoption of any such plan of reorganization or readjustment by the Committee under the provisions of this Section, copies thereof shall be filed with the Depositary and thereupon a brief notice of the fact of such adoption and filing and a copy of such plan shall be mailed by the Secretary of the Committee in an envelope with postage prepaid to each of the Depositors, addressed to them at the addresses which they shall have last given in writing to the Depositary, and the mailing of such notice shall be deemed to be and shall be sufficient and conclusive evidence of notice to the Depositors of the approval and adoption of any such plan or agreement by the Committee. In the event that any such plan of reorganization or readjustment shall be so approved and/or adopted, and copies thereof filed with the Depositary and notice thereof given as above provided, prior to a sale of the Trust Property (whether in foreclosure proceedings, at a Trustee's sale or by any other legal proceedings), any Depositor may, within twenty (20) days after the placing of such envelope in the United States mails in the City of San Francisco, California, or at such other place

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

in the United States as said Secretary may select, file with the Depositary a notice, in writing, that such Depositor dissents from such plan or agreement, and may withdraw from deposit bonds and/or coupons in the aggregate principal amount represented by the Certificates held by him or anything then held by the Depositary and/or the Committee in lieu thereof, upon surrender of his Certificate properly endorsed in blank and upon payment of such amount as the Committee, in its absolute discretion, may fix as his proportion of the reasonable compensation, charges and expenses of the Committee, including, among other things, attorneys' fees, and/or of any indebtedness, liabilities and obligations incurred by the Committee and/or of any advances which may have been made by or to the Committee for purposes other than its compensation, charges and expenses, in which event the withdrawing Certificate holder shall receive such evidence of interest in such advances as the Committe, in its absolute discretion, may prescribe. The exercise of such right of withdrawal shall release and discharge the Committee and the Depositary and their officers, agents and attorneys from any and all liability at law or in equity, in tort or in contract, known or unknown, fixed or contingent, or of any nature or character whatsoever, as to each such withdrawing Depositor. Such plan or agreement shall be binding upon all Depositors who shall not have filed dissent and made such withdrawal within the

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

period and in the manner above provided, their heirs, legal representatives, successors and assigns, all of whom shall be conclusively deemed to have assented thereto, whether they shall have received actual notice thereof or not, and shall be irrevocably bound and concluded by the same. In the event that any such plan of reorganization or readjustment shall be so approved and/or adopted, and copies thereof filed with the Depositary and notice thereof given as above provided, after a sale of the Trust Property (whether in foreclosure proceedings, at a Trustee's sale or by any other legal proceedings), any Depositor may thereafter signify his dissent to such plan by filing written notice of such dissent with the Depositary within twenty (20) days after the placing of such envelope in the United States mails in the City of San Francisco, California, or at such other place in the United States as said Secretary may select. If the Depositors of twenty-five per cent (25%) in principal amount of bonds deposited hereunder shall so signify their dissent within such 20-day period, such plan shall be deemed to be rejected, and the Committee shall have no power to proceed under such plan, but may formulate and adopt an amended plan or a new plan, or may proceed to exercise the powers conferred upon the Committee in Article III hereof, or any of such powers, without a plan. In the event that the holders of less than twenty-five per cent (25%) in principal amount of

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

bonds deposited hereunder shall so signify their dissent within such 20-day period, such depositing bondholders as shall not have so signified their dissent within such period shall be deemed and treated as dissenting to said plan, and all of the Depositors shall be bound by said plan, and the Committee will thereupon be empowered and authorized by all of the depositing bondholders to carry out said plan.

The Committee is hereby authorized and empowered (whether before or after the adoption or submission of any plan or agreement) to adopt, approve or accept any amendment to or modification of any plan or agreement so formulated, adopted, accepted or approved, or supplement thereto, or to adopt, approve or accept a new plan or agreement in lieu thereof. Copies of such amendment, modification or supplement thereto or of any such new plan or agreement shall be filed, notice thereof shall be given and modifications therefrom may be effected, all upon the same terms and conditions, and with the same effect in these and all other respects as herein provided with reference to the original plan or agreement; provided, however, that if in the opinion of the Committee, which shall be conclusive and binding upon the Depositors, such amendment, modification or supplement does not materially affect the rights of the Depositors hereunder, no notice of the adoption, approval or acceptance thereof shall be necessary, and upon the filing with the Depositary of copies of such modi-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

fication, amendment or supplement and of the approval thereof by the Committee, the same shall become binding upon all the Depositors.

The Committee is hereby fully authorized and empowered in its sole and absolute discretion, at such times as it may deem expedient, subsequent to the election of the Committee to take title to the deposited bonds and coupons as herein provided, to declare any such plan or agreement or modified plan or agreement operative and to carry out any such plan or agreement or modified plan or agreement on the part of all the Depositors who shall not dissent in the manner hereinbefore indicated. Notwithstanding that the Committee has approved and adopted any plan and/or agreement or modified plan and/or agreement of reorganization, or readjustment, and has submitted the same to the Depositors, and the said Depositors shall have been conclusively deemed to have assented thereto as herein provided, the Committee may, nevertheless, without submission to the Depositors of the question of abandonment of such plan and/or agreement, or modified plan and/or agreement, abandon such plan or agreement, or any modified plan or agreement, and terminate the same. In case the Committee shall finally abandon a plan or agreement or a modified plan or agreement which may have been adopted, and shall not desire to substitute any other plan or agreement therefor, the bonds and coupons deposited or held hereunder, or their pro-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

ceeds, substitutes or avails then under the control of the Committee, shall be delivered to the several Depositors or their transferees in amounts representing their respective interests, upon surrender of their respective Certificates properly endorsed in blank, and the payment of such charges, expenses, indebtedness,, liabilities, and obligations, if any, as shall have been paid or incurred by the Committee and/or such advances as may have been made by or to the Committee, and the reasonable compensation of the Committee, and the Committee shall have full and absolute power to determine and to apportion the share of such charges, expenses, indebtedness, liabilities, obligations, advances and compensation to be borne by each Depositor.

Section 2. The title to any securities, property or moneys acquired and/or to be acquired by the Committee prior to and/or upon and/or subsequent to the consummation of a plan or agreement of reorganization or readjustment in accordance with the provisions of this Article IV, may, in the discretion of the Committee, be vested in a corporation to be organized by the Committee, or may be vested in a trustee or trustees (who may, but need not be, a member or members of the Committee), or the title to such securities, property or moneys may be held in such other manner as the Committee may determine. The Committee, in its discretion, may distribute stock, securities and/or certificates of beneficial interest of such corporation, trust and/

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

or trustee or trustees to the Depositors pro rata to their several and respective bond and coupon holdings as evidenced by the Certificates therefor; or the Committee may, in its discretion, hold the said securities, property or moneys and at such time or times as it may deem advisable sell or convert the said property or securities, or any part thereof, into money, and distribute the proceeds thereof, and the moneys, if any, theretofore held, to the Depositors pro rata as aforesaid. Before any such distribution, the charges, expenses and obligations of the Committee, and its reasonable compensation, shall be provided for. After any such distribution, the Committee shall thereupon be relieved from all liability hereunder. The accounts kept and the distribution made by the Committee shall be final as to calculation and amount.

As long as the Committee shall hold any property or securities the Committee may manage, control, vote upon or otherwise deal with the same in such manner as it may deem desirable and may enter into agreements providing for the voting of any stock held by the Committee, or may distribute voting trust certificates to the Depositors in lieu of any such stock.

Notwithstanding the provisions of this Article IV, the Committee may exercise any or all of the rights and powers conferred upon it by the provisions of Article III hereof, whether or not it shall make, enter into or submit to the Depositors any

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

plan or agreement of reorganization or readjustment as permitted by the provisions of this Article IV.

Article V.

Meetings of Depositors.

Any matter or question not herein provided for, or any matter or question suggested by the Committee, or any amendment of the terms or provisions of this Agreement, may in the sole discretion of the Committee be submitted to the Depositors at a meeting to be held at any place within the State of California, and called by letter placed in the United States postoffice in San Francisco, California, or at such other place in the United States as the Secretary may select, in an envelope with postage prepaid, at least ten (10) days before the day of such meeting addressed to each Depositor at the last known postoffice address of each Depositor, as shown by the addresses on file with the Depositary. Any such matter, question, or amendment so submitted shall be determined or adopted by a vote of said Depositors, holding Certificates issued hereunder representing a majority in principal amount of the bonds deposited hereunder, present at such meeting or at any adjournment thereof, in person or by proxy (which proxy may, but need not be, the Committee or a member thereof), and such determination or amendment shall be binding and conclusive upon all parties hereto; but no such amendment shall change or alter the rights, duties, obligations or liabilities of the Depositary or the

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

Committee, without their respective consents, in writing. Such meeting may be called at any time in the manner above specified, by the Committee or by Depositors holding Certificates representing at least twenty-five per cent (25%) in principal amount of the bonds deposited hereunder. The procedure of any such meeting of Depositors shall be determined by the Committee, except as herein otherwise provided.

Article VI.

Records of the Committee.

The Committee shall keep books showing its receipts and disbursements, and a record of its proceedings, and upon the termination of its duties, accounts of its expenses and disbursements shall be filed with the Depositary, and thereupon the Committee, and each member thereof, shall be discharged from all its or his duties, liabilities or obligations as to all Depositors hereunder. The Committee shall not be required to make any report or accounting other than said final account.

Article VII.

Termination of Agreement.

The Committee may, at any time (whether before or after the adoption or submission of any plan or agreement), terminate this Agreement whenever it shall think best so to do, by giving notice of such termination to each of the Depositors, by letter, duly mailed, with postage prepaid, ten days before such termination, addressed to the last known post-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

office address of each Depositor, as shown by the books of the Depositary; and this agreement shall be terminated whenever the termination thereof shall be requested in writing or writings filed with the Depositary by Depositors holding Certificates representing eighty per cent (80%) in principal amount of the bonds deposited hereunder, but only on such terms as shall satisfy all obligations of the Committee; and this Agreement and all trusts created hereby or hereunder shall, unless sooner terminated as herein provided, terminate on April 15, 1945. The termination of this Agreement shall not affect any provisions, assents, acts, agreements or proceedings, whether of a legal nature or otherwise than the Committee has made, done or instituted, prior to such termination. In event of such termination of this Agreement, the Depositors, upon the payment of the reasonable compensation, charges, costs, expenses, disbursements and outlays of the Committee and of the Depositary and upon reimbursement and payment to the Committee and the Depositary for all indebtedness, obligations and liabilities incurred by the Committee and the Depositary, shall, upon the surrender to the Depositary of their Certificates endorsed in blank, be entitled to their pro rata share of all property, securities and cash held subject hereto, which, except as to money and property received from the sale of property now subject to said Trust Indenture, shall be disposed of and distributed in the manner hereinbefore directed.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

The Committee may as a condition precedent to any partial distribution require the presentation of Certificates for the notation thereon of such distribution.

Article VIII.

Liability of Committee and Depositary.

Section 1. Neither the Depositary nor the Committee nor any of its members shall be answerable or liable for the acts or omissions of any officer, employee, agent or attorney, appointed and selected with reasonable care, nor be under any obligation or liability not affirmatively expressed in this Agreement, nor shall any member of the Committee nor the Depositary be responsible to anyone for the acts or omissions of any other member of the Committee, or Depositary, as the case may be, and shall only be responsible at any time for his or its own actual bad faith in the discharge of his or its duties hereunder, or in the exercise of any of the powers and authority herein vested in the Committee or any member thereof or in the Depositary.

Section 2. The Committee and each member thereof and the Depositary shall always be protected and free from all liability in acting upon any bond, coupon, notice, request, consent, certificate (whether of deposit or otherwise), declaration, guaranty, affidavit, telegram, radio, cable, or other paper or document or signature believed by it or by any member of the Committee or by the Depositary, or any of them, as the case may be, to be genuine and

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

to have been signed by the proper party or parties, or by the party or parties purporting to have signed the same.

Section 3. Neither the Committee nor any member of it shall be personally liable for any act or omission of the Depositary. The Depositary shall not be liable or responsible for any act or omission of the Committee or any member thereof, and the opinion, decision, order, direction or approval of the Committee with reference to any and all business matters and things acted upon by the Committee, expressed in writing by a majority thereof, or certified to the Depositary or any other person, firm, or corporation, by the Chairman or the Secretary of the Committee to have been duly issued, made or adopted by the Committee, shall be a complete justification to the Depositary or any other person, firm, or corporation, for any action taken by such Depositary, or other person, firm, or corporation, pursuant thereto. The Depositary shall always be protected and free from all liability in acting upon the opinion of counsel employed by the Depositary (which counsel may be the counsel for the Committee).

Section 4. Neither the Committee nor the Depositary shall be responsible for the financial condition of any person, company or trust whose securities shall be accepted in exchange for the property or deposited securities of the Mortgagor.

No statement, explanation or suggestion con-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

tained in this Agreement, or in any plan adopted hereunder, or in any notice, telegram, letter or circular issued by advertisement or otherwise by the Depositary or by the Committee, is intended or is to be accepted as a representation or warranty or as a condition of deposit or assent under this Agreement or any agreement supplemental hereto. No defect or error shall release any deposit under this Agreement or affect or release any assent hereto except by the written consent of the Committee.

Section 5. The Committee and the Depositary, their officers, agents and attorneys, shall be released from all liability and accountability of every kind, character or description whatsoever by the acceptance by the holders of a majority in amount of outstanding Certificates of any property, securities, money or benefits distributed by the Committee and/or the surrender of their Certificates of Deposit, save the obligation to make delivery of a like prorata amount of property, securities, money or benefits to the other holders of Certificates upon the surrender of such Certificates; and the acceptance of such property, securities, money or benefits hereunder by any Depositor shall conclusively and finally estop him, and by a majority in amount of the Depositors shall conclusively and finally estop all the Depositors from questioning the confromity of the taking by the Committee and distribution and delivery of such property, securities, money or benefits in any particular to any of the

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

provisions of this Agreement, or any plan or agreement, or modified plan or agreement which may be adopted hereunder.

Section 6. The Depositary shall be entitled to compensation for its services in an amount to be agreed upon with the Committee, and also to reimbursement for any and all expenses and disbursements incurred hereunder.

Section 7. The Committee, or any member thereof, or its officers, agents and employees, shall not be personally liable for any debts contracted by them, or any of them, or upon any contract, agreement or other obligation entered into by them, or any of them, or for damages to persons or property incurred by them, or any of them, or for damages to persons or property of any kind whatsoever, or for salaries or non-fulfillment of contracts, and it is expressly agreed that any and all such liability or obligations shall constitute a liability or obligation solely against the property held by the Committee.

Section 8. The Depositary shall not be liable for interest on any funds at any time on deposit hereunder except such as shall be allowed by the Depositary upon similar accounts, or as shall be agreed upon at the time of any such deposit, and may treat any such funds as a general deposit.

Article IX.

Removal and Resignation of Depositary.

Section 1. The Committee shall have the power

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

to remove the Depositary, and the Depositary may resign and be discharged as Depositary by sending written notice by registered mail, addressed to the Chairman and to the Secretary of the Committee, to their respective addresses last known to such Depositary; and such resignation shall take effect upon the date specified in such resignation, which date, however, shall not be less than ten (10) days after the mailing of such notice, unless the Committee shall waive such notice and accept a shorter notice. In the event of the removal or resignation of the Depositary hereunder, a successor Depositary shall be appointed by written instrument (executed at least in duplicate) signed by a majority of the members of the Committee. Such successor Depositary shall be a trust company or state or national bank situated in the City of San Francisco, California, having a paid-up capital of not less than $1,000,000, if there be such a trust company or bank willing and able to act as Depositary upon reasonable or customary terms. Upon such appointment being lodged with such resigning or removed Depositary and with such successor Depositary, the said successor Depositary shall thereupon have all the powers of said resigning or removed Depositary, as if originally appointed Depositary hereunder, and upon the payment to said resigning or removed Depositary of its compensation, fees, costs, expenses, disbursements and outlays, it shall turn over to said successor Depositary, all records, bonds,

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

coupons, money, securities and property, remaining deposited hereunder, or held by it as Depositary hereunder, and shall thereupon be relieved of all further liability hereunder, except for its own wilful misconduct.

Article X.

Chairman, Secretary and Assistant Secretary of the Committee.

Gerald D. Kennedy is hereby nominated for and selected as Chairman of the Committee, and Wellington Henderson is hereby nominated for and selected as Secretary of the Committee, and they shall respectively continue to act as such officers until they shall resign or be removed as herein provided.

Article XI.

Miscellaneous.

Section 1. The words "Trust Indenture" whenever used herein, unless the context shall expressly indicate to the contrary, shall be deemed to refer to the First Mortgage of The Whitney Estate Company to American Trust Company, Trustee, dated April 15, 1928, securing an authorized issue of $1,200,000 aggregate principal amount of First Mortgage Five and One-half Per Cent Gold Bonds of The Whitney Estate Company.

Section 2. The term "bond or bonds" whenever used herein, shall be deemed to include all bonds issued and outstanding under said Trust Indenture and all unpaid interest coupons appertaining there-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

to, whether matured or unmatured, unless such meaning is plainly inconsistent with the context hereof.

Section 3. The word "Trustee" shall be deemed to refer to American Trust Company, and any successor, as Trustee under said Trust Indenture.

Section 4. The term "Mortgagor" shall be deemed to refer to The Whitney Estate Company, a California corporation.

Section 5. The word "Secretary" shall be deemed to include any Assistant Secretary of the Committee.

Section 6. The invalidity of any one or more phrases, clauses, sentences and/or paragraphs shall not affect the remaining portions of this Agreement, or any part thereof, all of the phrases, clauses, sentences and/or paragraphs of this Agreement being inserted conditionally on their being held valid in law, and in the event that any one or more of the phrases, clauses, sentences and/or paragraphs contained herein should be invalid, this Agreement shall be construed as if such invalid phrases, clauses, sentences and/or paragraphs had not been inserted.

Section 7. This Agreement shall be construed solely as an agreement among the parties hereto, and solely affecting and relating to the Committee, the Depositors, and the Depositary, and neither the owners or holders of bonds and/or coupons not deposited or subjected to the operation of this agree-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

ment in accordance with the provisions hereof, nor any other person, firm, or corporation, shall have any rights whatsoever hereunder. This Agreement shall bind and inure to the benefit of the several parties hereto and each of them, and each and all of the survivors, heirs, executors, administrators, successors, and assigns of said parties.

Article XII.

Execution of Agreement.

Section 1. The members of the Committee by their signatures to this Agreement, signify their consent to accept and exercise such powers and authority (subject to the terms thereof) as may be conferred upon them by the terms and provisions of this Agreement. This Agreement may be executed by the members of the Committee in one or more counterparts, and all of such counterparts shall constitute the original Agreement. This Agreement shall take effect and be operative upon the Depositors hereunder, irrespective of the number of bonds and/or coupons that may be deposited hereunder. Upon this Agreement being signed by any three members of the Committee in person or by duly authorized attorneys-in-fact, the Committee shall be deemed to be constituted and this Agreement shall become effective as to the members so signing.

In Witness Whereof, the members of the Committee, as parties of the first part, have hereunto set their hands and seals, and the Depositors, as

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 1—(Continued)

parties of the second part, evidence their assent hereto by their repective deposits hereunder of said bonds and/or coupons in the manner hereinbefore provided, all as of the day and year first above written.

.... (Seal)

Lloyd D. Hirschfeld,

.... (Seal)

Gerald D. Kennedy,

.... (Seal)

Philip Paschel,

.... (Seal)

R. M. Underhill,

.... (Seal)

F. W. Wentworth,

Committee.

To evidence its acceptance of the duties of the Depositary hereunder, American Trust Company has caused this agreement to be signed in its corporate name by one of its Vice-Presidents, and its corporate seal to be hereto affixed by one of its Assistant Trust Officers.

American Trust Company,

By..

Vice-President.

Attest:

....

Assistant Trust Officer.

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: Q. This committee was formed in June; is that right, Mr. Hanford?

A. If my recollection serves me correctly, it was around June.

Q. After the formation the committee requested that the bondholders deposit their bonds with the committee; is that correct?

A. Well, that is correct, and it is not correct.

Q. Will you explain what happened?

A. The bondholders committee was formed for the purpose of investigating the default that had occurred, and the general problems of the owning corporation, which was the Whitney Estate Company, were discussed by the committee in conference with the representatives and counsel of the Whitney Estate Company. Several months elapsed between the time of the actual default and the call for bonds, due to the fact that the Whitney Estate Company was formulating a reorganization plan which they desired. It was after the formation and the provisions of this so-called reorganization plan of the Whitney Estate Company that an actual call for bonds was made, which was probably two or three months after the committee was formed.

Q. So, for the first two or three months there were no bonds held by the committee, at all?

A. Correct.

Q. And no certificates of deposit issued?

A. Correct.

Q. After that the call for bonds was made?

A. Right.

(Testimony of Lloyd D. Hanford.)

Q. It is a fact, is it not, Mr. Hanford, that up until November, 1933, the committee and the Whitney Estate Company were working on a so-called deferment plan? A. Correct.

Q. And, generally speaking, if it had gone into effect it would have provided that the principal of the bonds maturing in the next few years would be deferred until a later date, and the [6] interest would be deferred for a certain period?

A. Yes, sir.

Q. Did that deferment plan go into effect?

A. It did not.

Q. It was abandoned, was it?

A. It was abandoned.

Q. When, approximately?

A. I could not give you the exact date. I think there is a document in evidence that will show the approximate time it was abandoned.

Q. It was before the end of the year 1933?

A. Yes; as I recall it was.

Q. That it was abandoned? A. Yes.

Q. What was the reason for the abandonment of the deferment plan?

A. The committee could not secure sufficient deposits of bonds under the deferment plan.

Q. Did you, as a member of the committee, give consideration to the deferment plan, and did you consider it was an equitable plan from the point of view of the bondholders?

A. No, I did not.

Q. Why was that?

(Testimony of Lloyd D. Hanford.)

A. Because I felt that the bondholders would be deprived—the value of the property——

Q. I can't hear you.

A. It was my belief that the value of the securities under the bond issue was not equivalent to the total of the outstanding bonds.

Q. After the committee came to the conclusion that the deferment plan would have to be abandoned, what did it decide to do with the property, if anything?

A. It decided to attempt to acquire the property for the bondholders.

Q. Did the committee come to any conclusions as to the mechanics under which the property would be acquired by the bondholders, or for the bondholders?

A. Their general plan was to form a new corporation, in which the bondholders would become the owners of the property.

Q. You mean the owners of the stock of the new corporation? [7] A. Yes, sir.

Q. Did the committee come to any conclusion as to the mechanical method of acquiring legal title to the property?

A. The only conclusion they came to was to foreclose and acquire by exchange of bonds. I don't believe I quite understand what your question was.

Q. The legal title of the property was in the old corporation? A. Yes, sir.

Q. The committee—if I may lead the witness—came to a conclusion to get the property, the title

(Testimony of Lloyd D. Hanford.)

to the property, in the name of the new corporation, it would be necessary to have a trustee's sale; isn't that correct? A. Correct.

Q. This plan contemplated that to the extent of the bonds on deposit with the committee, the purchase price at the trustee's sale would be satisfied by an application of the deposited bonds?

A. That is correct.

Q. Which meant that cash would only be necessary to the extent to pay off the distributive share of the purchase price that would inure to non-depositing bondholders? A. That is correct.

Q. So the more bonds on deposit the less cash that would be required? A. Correct.

Q. In the early part of 1934, it is correct, is it not, Mr. Hanford, that the committee instructed the American Trust Company, which was the trustee under the bond indenture, to notice the property for sale? A. Yes, sir.

Q. And the sale was fixed for the 28th of February, 1934? A. Correct.

Q. Who were the attorneys for the committee?

A. Brobeck, Phleger & Harrison.

Q. And Mr. Meyer, of that firm, was the man who handled most of the [8] business?

A. Correct.

Q. Did the committee instruct Mr. Meyer to prepare articles of incorporation for the new corporation before the sale, or after the sale?

A. Prior to the sale of the property.

Q. Do you know whether, prior to February 28,

(Testimony of Lloyd D. Hanford.)

1934, Mr. Meyer submitted a draft of the articles of incorporation to the committee?

A. Yes, he did.

Q. Did the sale proceed on February 28, 1934?

A. Yes, it did.

Q. Prior to the date fixed for the sale, did the committee have a meeting at which Mr. Vincent Whitney was present? A. Yes.

Q. Who was Mr. Vincent Whitney?

A. Mr. Vincent Whitney was an officer of the Whitney Estate Company, who were the defaulting owners of the Whitney Building.

Q. He met with the committee in February, was it, Mr. Hanford, bearing in mind the sale was February 28th? A. Yes.

Q. It was February in which Mr. Whitney met with the committee?

A. I really can't recall the exact date that Mr. Whitney met with them.

Miss Phillips: If counsel has a memorandum showing the date I don't object to his leading the witness.

Mr. Ellis: I have certain memoranda, but I don't believe it is material.

Q. At any rate, between the date when the trustee issued the notice of sale and the date when the sale took place, Mr. Vincent Whitney attended a meeting of the committee? A. Correct.

Q. And he requested the committee, did he not, that the sale be postponed for a period?

A. That is correct.

(Testimony of Lloyd D. Hanford.)

Q. He had in mind some new plan that would permit the Whitney Estate Company to continue as the owner of the bonds? [9]

A. I don't know whether it was a new plan or the old plan, but he had some idea he could put over a type of deferment plan.

Q. What answer did the committee give to Mr. Whitney's request?

A. They would consent to a 30-day postponement, providing title to the property was given to the bondholders committee.

Q. You mean title, or possession?

A. Possession.

Q. Do you mean the bondholders committee wanted the title?

A. Well, I am not sure. In other words, title was to leave his hands.

Q. Possession?

A. Possession was to leave the hands of the Whitney Estate Company.

Q. What did Mr. Whitney have to say about that? A. They refused.

Mr. Ellis: I believe it will be stipulated, Miss Phillips, that on February 19, 1934, the Whitney Estate Company filed an action in the Superior Court of the City and County of San Francisco for the purpose of enjoining the sale?

Miss Phillips: Yes, so stipulated.

Mr. Ellis: And that an application for preliminary injunction was made to the Superior Court and that that application was denied by the Superior Court on February 26, 1934?

(Testimony of Lloyd D. Hanford.)

Miss Phillips: So stipulated.

Mr. Ellis: February 27th is the date. May it also be stipulated that on February 21, 1934, the American Trust Company, the Trustee under the bond indenture, filed an action against the Whitney Estate Company for specific performance of the convenants contained in the bond indenture under which possession of the property was to be turned over to the trustee in the event of default?

Miss Phillips: So stipulated. [10]

Mr. Ellis: Also providing for a receiver?

Miss Phillips: So stipulated.

Mr. Ellis: May it also be stipulated that at the same time that the court in the other action denied the application of the Whitney Estate Company for an injunction the court in the action filed by the American Trust Company granted an order appointing a receiver of the property?

Miss Phillips: So stipulated.

Mr. Ellis: Q. Mr. Hanford, you recall these facts, if not the dates, do you not? A. I do.

Q. As to which we just stipulated?

A. I do.

Q. Do you know a receiver went into possession of the property? A. Yes.

Q. Who was that receiver?

A. Vincent Finnegan, of the Buckby-Thorne Company.

Q. I believe you personally represented the committee at the Trustee's sale, did you not?

A. Yes.

(Testimony of Lloyd D. Hanford.)

Q. You made the bid for the property on behalf of the committee?

A. On behalf of the bondholders committee, yes.

Q. Do you recall what the bid price was?

A. The bid price was $650,000.

Q. Mr. Hanford, I show you what purports to be a copy of a letter dated March 2, 1934, from Brobeck, Phleger & Harrison to Mr. Wellington Henderson, 340 Pine street, San Francisco, California, and ask you whether you have seen the original of this letter?

A. Yes; I have seen the original.

Mr. Ellis: Without reading the letter into evidence, your Honor, I might state it was a letter in which Brobeck, Phleger & Harrison, the attorneys for the bondholders committee, enclosed an original draft of articles of incorporation for the [11] new company and referred to the previous submission of a preliminary draft. I might suggest, your Honor, that I am offering a copy, I believe there is a stipulation——

Miss Phillips: Yes; there is no objection.

Mr. Ellis: Q. Mr. Hanford, the original of this letter was signed by Mr. Meyer, of Brobeck, Phleger & Harrison? A. Yes.

Mr. Ellis: I will offer this copy of the letter dated March 2, 1934, to Wellington Henderson, as Plaintiff's Exhibit No. 2.

(The document was marked "Plaintiff's Exhibit 2.")

(Testimony of Lloyd D. Hanford.)

PLAINTIFF'S EXHIBIT No. 2

(Copy)

March 2, 1934.

Mr. Wellington Henderson,
340 Pine Street,
San Francisco, California.

In re: One Thirty Three
Geary Corporation

Dear Mr. Henderson:

We enclose herewith original draft of Articles of Incorporation of the above named company. If the copy of this draft, which we previously sent you, has now been approved by all of the members of the Bondholders' Committee, the enclosed original should be executed and acknowledged by them and should then be returned to us for filing. If you cannot get all of the members of the Committee together at the same time to acknowledge their signatures, each should acknowledge his signature separately, having the Notary attach a certificate of acknowledgment of his individual signature.

Very truly yours,

BROBECK, PHLEGER & HARRISON

By

TRM:MM
Enclosure.

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: Q. Mr. Henderson was the secretary of the committee, was he not?

A. Yes, he was.

Mr. Ellis: Will you stipulate, Miss Phillips, that the letter dated March 2, 1934, from Brobeck, Phleger & Harrison to Frank C. Jordan, Secretary of State, may be put in evidence?

Miss Phillips: Yes.

Mr. Ellis: I offer in evidence a copy of a letter dated March 2, 1934, to Hon. Frank C. Jordan, Secretary of State, Sacramento, California, from Brobeck, Phleger & Harrison, as Plaintiff's Exhibit No. 3.

(The document was marked "Plaintiff's Exhibit 3.")

PLAINTIFF'S EXHIBIT No. 3

(Copy)

March 2, 1934.

Honorable Frank C. Jordan,
Secretary of State,
Sacramento, California.

Dear Sir:

Please advise us whether the name "One Thirty Three Geary Corporation" is available for corporate use.

Very truly yours,
BROBECK, PHLEGER & HARRISON
By

TRM:MM

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: I offer in evidence as Plaintiff's Exhibit 4 a copy of a letter dated March 3, 1934, from Frank C. Jordan, Secretary of State, to Brobeck, Phleger & Harrison. Any objection, Miss Phillips?

Miss Phillips: No objection.

(The document was marked "Plaintiff's Exhibit 4.")

PLAINTIFF'S EXHIBIT No. 4

(Copy)

State of California
Department of State
Sacramento

March 3, 1934.

Brobeck, Phleger & Harrison
Crocker Bldg.
San Francisco, Calif.

Attention: Theo. R. Meyer, Esq.

Gentlemen:

Replying to your inquiry concerning the availability of the name

"One Thirty Three Geary Corporation"

we advise that the same is not now under reservation, nor is it the name of any domestic or foreign corporation now in good standing in this State, nor does it closely resemble the name of such a corporation, or a name which is under reservation, nor would it be likely to mislead the public.

It will be understood that unless you obtain a certificate of reservation of said name, as provided

(Testimony of Lloyd D. Hanford.)

in section 291, Civil Code, you cannot be assured of being able to use it.

No particular form of application is prescribed, and accordingly, a certificate will be issued upon request therefor, irrespective of its form. Any such certificate has the effect of reserving the name therein set forth for a period of thirty (30) days.

Our fee for such certificate is $2.00.

Very truly yours,

FRANK C. JORDAN,

Secretary of State

By A. A. BREWER

[Endorsed]: Filed 7/10/42.

Mr. Ellis: Q. Did the Whitney Estate Company dismiss its action as soon as the sale took place? A. No, it did not.

Q. It went ahead with that action?

A. Yes, it did. [12]

Q. I believe depositions were taken in March at the sale. A. Correct.

Q. Was the corporation which you testify the committee considered forming actually formed after the sale? A. No.

Q. Why wasn't it formed, if you know?

A. Well, firstly, the trustee was in possession, at least the receiver was operating the property due to the action that had been commenced by the

(Testimony of Lloyd D. Hanford.)

Whitney Estate Company, and the bondholders protective committee required some time for the mechanics of the preparation of a corporation to be formed sometime after the bondholders committee were actually in possession and operating the property.

Q. So that there were two reasons, then, why the corporation was not immediately formed, one was because the receiver and not the committee was in possession? A. Correct.

Q. Also title was being attacked?

A. Correct.

Q. Also, it took a little time to get the corporation functioning mechanically? A. Yes, sir.

Q. Sometime after the sale do you recall that negotiations were entered into between the committee and the attorney for the Whitney Estate Company with a view toward disposing of the litigation? A. Yes.

Q. I show you, Mr. Hanford, what purports to be a mimeographed copy of minutes of meeting of the bondholders protective committee of Whitney Estate Company, held on May 15, 1934, and ask you whether that is a facsimile of your signature.

A. Yes, it is, and a facsimile of the actual minutes.

Q. You have read these minutes since the date of the meeting? A. Yes.

Q. You acted as secretary of the committee at that meeting?

A. I was acting secretary at that meeting. [13]

(Testimony of Lloyd D. Hanford.)

Q. At the date of that meeting, and the minutes contain a true and correct transcript of what took place? A. Yes.

Mr. Ellis: I offer in evidence as plaintiff's exhibit next in order a mimeographed copy of the minutes of meeting of bondholders protective committee of the Whitney Estate Company held on May 15, 1934.

(The document was marked "Plaintiff's Exhibit 5.")

PLAINTIFF'S EXHIBIT No. 5

Minutes of the Meeting of the
Bondholders Protective Committee
of the Whitney Estate Company.

The regular meeting of the Bondholders Committee of The Whitney Estate Company was held at the main office of the American Trust Company, 464 California Street, San Francisco, California.

Time: 2:30 P. M. May 15th, 1934.

Present: Gerald Kennedy, R. M. Underhill, F. W. Wentworth and Lloyd D. Hirschfeld.

Absent: J. R. Kruse.

Others Present: Mr. Theodore Meyer as Counsel for the Committee and Mr. Sims of the Trust Dept. of the American Trust Co. were also present.

Mr. Wellington Henderson, Secretary, was absent and Mr. Lloyd D. Hirschfeld acted as Secretary for the Committee.

The meeting was called to order by Mr. Kennedy

(Testimony of Lloyd D. Hanford.)
as Chairman. Matter of the settlement of the pending suits between the Whitney Estate Company and the Bondholders Committee and others was discussed. It was moved by Mr. Wentworth, seconded by Mr. Kennedy with no opposing votes after general discussion with Mr. Meyer as Counsel for the Committee and Mr. Sims on behalf of the Trust Dept. of the American Trust Company that the following settlement should be made:

The Committee to pay to the Whitney Estate Company the sum of $7500.00 in cash. Agree to withdraw all pending suits, which have been filed on its behalf against the Whitney Estate Company and agree to waive any right to any share of a deficiency judgment which may be brought by the trustees on behalf of the non-depositing bondholders, and the Committee will not pay any costs or counsel fees in connection with the filing or proceeding toward the trial of that suit. Committee will waive any rights to any notes or accounts receivable from those who are no longer tenants in the Whitney Building.

The Whitney Estate Company assigns to the Committee all notes and accounts receivable of tenants now in the Whitney Building in the total aggregate amount of approximately $20,000.00. They are also to execute a bill of sale to the Committee covering all furniture in and about the Whitney Building including fittings and fixtures in the Wallach's store. Whitney Estate Company is to assign to the Committee, all fire insurance policies now in

(Testimony of Lloyd D. Hanford.)

force, supposedly uncancelled, covering the Whitney Building. The Whitney Estate Co. to retain for their own purposes any liability or compensation insurance policies, which they had prior to the trustee's sale. The Whitney Estate Company will dismiss all suits against the Trustee, the Committee, as a committee or as individuals or as representatives of various sundry interests and will agree to commence no further legal action, which in any way, may involve the Bondholders Committee or the new corporation to be formed. The Whitney Estate Company is to give to the Bondholders Committee a quitclaim deed to the premises known as The Whitney Building. The Whitney Estate Company is to make full settlement with the firm of Baldwin & Howell and any co-brokers in reference to any real estate commissions which may be due. In the like manner, they are to make proper settlements with any trade creditors which may in any way be deemed to involve the Committee and Owners of the herein mentioned property.

Mr. Lloyd D. Hirschfeld was authorized by the Committee to submit the herein proposal to the firm of Rogers, Clark and O'Brien, as the attorneys for the Whitney Estate Company for the approval or rejection by the Whitney Estate Company.

The Committee instructed Mr. Meyer as counsel for the Committee to immediately proceed with the formation of a new corporation in full accordance with the original draft, with the exception that the Board of Directors shall be the Bondholders Com-

(Testimony of Lloyd D. Hanford.)

mittee as now constituted and shall be elected for a period of two years. Mr. Meyer was also requested to formulate a letter to the depositing bondholders outlining completely the new plan of reorganization to include notification that the new company, for the purpose of avoiding litigation and securing clear title to the property and dismissing all pending suits in which the depositing bondholders might have any liability was to give an indemnity to The Whitney Estate Company against any deficiency judgment which may be secured and collected by the non-depositing bondholders. Further reciting that if the deficiency suit were brought by the non-depositing bondholders, all costs relative to that suit would have to be paid by the said non-depositing bondholders and the Committee believing that any judgment against The Whitney Estate Company by way of a deficiency would be worthless, have agreed to not only waive any interest to the said deficiency but have also agreed not to pay any costs, counsel fees or other expenses in connection with the said possible deficiency suit or the filing of that suit.

The meeting was adjourned at 3:45 P. M.

Minutes prepared and recorded by

LLOYD D. HIRSCHFELD
Acting Secretary.

LDH:ID

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: Q. The minutes, Mr. Hanford, point out that you were authorized to submit a proposal to the attorney for the Whitney Estate Company for the termination of the action? A. Yes.

Q. Will you explain how it was you were authorized to submit a proposal?

A. What you are asking me is how I happened to be the one that was authorized?

Q. Yes.

A. Well, the committee of bondholders met and I was the one that was really familiar with real estate and real estate values, and various matters pertaining to real estate, so I think it was their belief I was the best able to handle it.

Q. Had you had any negotiations with the attorney for the Whitney Estate Company before the date of that meeting relative to a settlement of the action? A. Yes, I had.

Q. You had had a sort of tentative agreement with the attorneys? A. Yes.

Q. You did submit the proposal that is referred to in these minutes to the attorneys for the Whitney Estate Company? A. Yes.

Q. And was that verbal or in writing?

A. It was verbal.

Q. It resulted in both actions being dismissed?

A. Yes.

Q. When I say "both actions," you understand I refer to the action that the Whitney Estate Com-

(Testimony of Lloyd D. Hanford.)

pany brought, and the action that the American Trust Company brought? A. That is correct. [14]

Q. At the time the litigation was settled, was the receiver discharged? A. Yes.

Q. And possession of the property was turned over to the committee?

A. To the bondholders.

Q. Also the Whitney Estate Company quit-claimed the property to the committee?

A. Yes.

Q. After the receiver went out of possession who managed the property?

A. I was appointed manager on behalf of the bondholders protective committee.

Q. After the quitclaim deed was executed and delivered to the committee, and after the possession of the property was turned over to the committee, did the committee go ahead with this plan to form a new corporation?

A. Yes, it did. It instructed the attorneys to proceed with the mechanical end of it.

Q. Was the corporation immediately formed?

A. No, it was not immediately formed.

Q. What was the reason for the delay?

A. Purely mechanical, I believe.

Q. As a matter of fact, you recall things going along during the summer of 1934?

A. Yes. There were, I believe, two or three members of the bondholders committee away on their vacations, and it was rather difficult to get

(Testimony of Lloyd D. Hanford.)

signatures to necessary papers; that is what I referred to by mechanical difficulties.

Mr. Ellis: Will you stipulate, Miss Phillips, that the articles of incorporation of 133 Geary Corporation were filed in the office of the Secretary of State of California on September 4, 1934?

Miss Phillips: So stipulated.

Mr. Ellis: And that a certified copy of articles was filed in the office of the County Clerk of the City and County of [15] San Francisco on September 5, 1934?

Miss Phillips: So stipulated.

Mr. Ellis: Q. The 133 Geary Corporation was the corporation, Mr. Hanford, that the committee had instructed its attorneys to form?

A. That is correct.

Mr. Ellis: Will you stipulate, Miss Phillips, that the application of 133 Geary Corporation filed with the Commissioner of Corporations for a permit to issue stock was filed on October 8, 1934?

Miss Phillips: So stipulated.

Mr. Ellis: Miss Phillips, I am going to offer in evidence, a copy of the original application. I made a copy from the office copy of Brobeck, Phleger & Harrison. Have you a copy?

Miss Phillips: I believe I have a photostatic copy.

Mr. Ellis: May it be stipulated that this application may be filed with the omission of two exhibits, one of the exhibits is a printed copy of the

(Testimony of Lloyd D. Hanford.)

bondholders deposit agreement, which is already in evidence, and the other exhibit which is being omitted is a list of bondholders which is labelled "Confidential"?

Miss Phillips: I will stipulate that it may go in evidence as Exhibit 6, I think the number is, with the omission of the two exhibits to which counsel has referred.

(The document referred to was marked "Plaintiff's Exhibit 6.")

PLAINTIFF'S EXHIBIT No. 6

Before the Department of Investment
Division of Corporations
of the
State of California.

No. ....

In the Matter of the Application of

ONE THIRTY THREE
GEARY CORPORATION,

for a Permit Authorizing it to Issue Securities.

APPLICATION

The application of One Thirty Three Geary Corporation respectfully shows:

1. Applicant is a California corporation, incorporated September 4, 1934.

2. Applicant's post office address is Room 609, 133 Geary Street, San Francisco, California.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

3. The names of applicant's permanent officers and directors are as follows:

President: Robert M. Underhill

Vice President: A. D. King

Vice President: Lloyd D. Hirschfield

Secretary: Wellington Henderson

Treasurer: Gerald D. Kennedy

Assistant Secretary: Irma L. Dito

Assistant Treasurer: F. W. Wentworth

General Manager: Lloyd D. Hirschfeld

Directors: Lloyd D. Hirschfeld, Gerald D. Kennedy, F. W. Wentworth, R. M. Underhill, A. D. King.

4. Applicant was incorporated for the purpose, among others, of acquiring the Whitney Building, an eight story store and office building located at 133 Geary Street, San Francisco, California, and all other property owned and held by Lloyd D. Hirschfeld, Gerald D. Kennedy, F. W. Wentworth, R. M. Underhill and A. D. King, as Committee under The Whitney Estate Company Bondholders' Deposit Agreement, subject to all obligations and liabilities of said Committee, all of which are to be assumed by applicant concurrently with said conveyance and transfer.

5. Applicant has an authorized capital consisting of twelve thousand (12,000) shares, without nominal or par value. Applicant proposes to issue eleven thousand one hundred thirty (11,130) shares of its said stock to said Committee, in considera-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

tion of the conveyance and transfer to applicant of all assets and property held by said Committee, including said Whitney Building, subject to all obligations and liabilities of said Committee. Said Committee proposes, after receiving said stock, to distribute the same pro rata among the bondholders who have deposited bonds with said Committee pursuant to the provisions of said Bondholders' Deposit Agreement.

6. Attached hereto as exhibits are the following:

Exhibit "A"—Copy of applicant's Articles of Incorporation.

Exhibit "B"—Copy of applicant's By-Laws.

Exhibit "C"—Copy of applicant's proposed form of stock certificate.

Exhibit "D"—Copy of resolution of applicant's Board of Directors authorizing the filing of this application and the issue of said stock.

Exhibit "E"—Statement of the assets and liabilities of said Bondholders' Committee as of August 31, 1934.

Exhibit "F"—Copy of the Bondholders' Deposit Agreement under which said Committee is acting.

Exhibit "G"—Lists of names and addresses of depositing and non-depositing bondholders, showing face value of bonds deposited or held by each. It is requested that these lists be kept confidential. Applicant cannot vouch for the absolute accuracy of the list of non-depositing bondholders, but said

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

list is based upon the most recent and reliable information available to applicant.

Wherefore, applicant prays that a hearing be held on notice to all interested parties pursuant to the provisions of Sections 14 and 15 of rules of the Division of Corporation governing reorganizations, effective August 1, 1934, and that thereafter a permit be issued authorizing applicant to issue eleven thousand one hundred thirty (11,130) shares of its stock, without nominal or par value, to Lloyd D. Hirschfeld, Gerald D. Kennedy, F. W. Wentworth, R. M. Underhill and A. D. King, as Committee under The Whitney Estate Company Bondholders' Deposit Agreement in consideration of the conveyance and transfer to applicant of all assets and property held by said Committee, including said Whitney Building, subject to all obligations and liabilities of said Committee, all of which are to be assumed by applicant concurrently with said conveyance and transfer.

Respectfully submitted,

ONE THIRTY THREE
GEARY CORPORATION

By ROBERT M. UNDERHILL
President

By WELLINGTON HENDERSON
Secretary

BROBECK, PHLEGER &
HARRISON
Attorneys for Applicant

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

State of California,
City and County of San Francisco—ss.

Wellington Henderson, being first duly sworn, deposes and says:

That he is an officer, to wit: the Secretary, of One Thirty Three Geary Corporation, a corporation, the applicant named in the foregoing application, and as such is authorized to verify the said application; that he has read the said application and knows the contents thereof, and that the same is true.

WELLINGTON HENDERSON

Subscribed and sworn to before me this 1st day of October, 1934.

(Seal) EUGENE P. JONES

Notary Public. In and for the City and County of San Francisco, State of California.

EXHIBIT "A"

Articles of Incorporation
of
One Thirty Three Geary Corporation

Know All Men by These Presents:

That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California;

And We Do Hereby Certify:

First: That the name of said corporation is One Thirty Three Geary Corporation.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

Second: That the purposes for which it is formed are:

1. To acquire, hold, own, operate, manage, lease, sell and/or otherwise dispose of an office and store building or buildings and to do any and all things incidental thereto.

2. To buy, lease, or otherwise acquire, own or hold and to sell, rent, mortgage, or otherwise dispose of, both real and personal property, and to buy, rent or construct and maintain, buildings, machinery, or other equipment on such real property, and to sell or encumber the same.

3. To acquire, hold or sell, assign, lease, grant licenses in respect of, or otherwise dispose of, letters patent of the United States, or any foreign countries, patents, patent rights, licenses, privileges, inventions, copyrights, improvements and processes, trademarks and trade names, labels and brands, franchises, concessions, and any and all kinds and character of interest therein.

4. To buy, sell, manufacture, import, export, handle, prepare for market and deal in, merchandise, materials, goods, commodities and supplies of all kinds.

5. To acquire and undertake the whole or any part of the business, property and liabilities of any person or company carrying on any business which said corporation is authorized to carry on, or possessed of property suitable for the purposes of said corporation.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

6. To buy, or otherwise acquire, hold, own, sell or otherwise dispose of and generally deal in its own stocks and bonds and securities, and the stocks and bonds and securities of other corporations, and also any other securities, or evidences of indebtedness whatsoever or any interest therein, and while the owner of such shares, bonds, securities or evidences of indebtedness, to exercise all the rights, powers and privileges of ownership, including the right of voting thereon.

7. To aid in any manner any corporation of which any of the bonds, stock or other securities or evidences of intebtedness or stock are held by said corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities, or evidences of indebtedness or stock.

8. To in any manner guarantee, underwrite, endorse or secure the notes, bonds, evidences or indebtedness or obligations of any person, firm or corporation, or of any part thereof or interest therein.

9. To borrow and loan money and to issue and receive promissory notes and bonds and other evidences of indebtedness and security therefor.

10. To mortgage, pledge or hypothecate all or any of the property of said corporation of every kind and character, including any franchises, and to make, execute and deliver mortgages, deeds of

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

trust and any other instruments which may be necessary or proper to secure its indebtedness.

11. To enter into, make, perform and carry out contracts of any kind for any lawful purpose with any person, firm, association or corporation.

12. To sell and issue shares of its capital stock upon such terms and conditions as to the Board of Directors of said corporation shall seem desirable and reasonable.

13. To have one or more offices to carry on all or any of its operations and business, and without restriction to purchase, or otherwise acquire, hold, own, mortgage, sell, convey, or otherwise dispose of, real and personal property of every class and description in any of the states, districts, territories or colonies of the United States and in any and all foreign countries.

14. And to do all or any of the above things in any part of the world, and as principals, agents, contractors, or otherwise, and by or through trustees, agents or otherwise, either alone or in conjunction with others; and to do all such other things as are incidental to, or conducive to the attainment of the above objects, or any of them and generally to carry on any other business which may seem to said corporation capable of being conveniently carried on in connection with the above, or calculated, either directly or indirectly, to enhance the value of or render profitable any of said corporation's properties or rights.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

The foregoing clauses shall be liberally construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of said corporation to carry on any other business in connection with the foregoing.

Third: That the principal office for the transaction of the business of said corporation is to be located in the City and County of San Francisco, State of California.

Fourth: That said corporation is to be authorized to issue only one class of shares of stock, that the total number of shares which said corporation shall have authority to issue is twelve thousand (12,000) shares, and that all of such shares of stock are to be without par value.

Fifth: That the number of directors of said corporation shall be five (5), and that the names and addresses of the persons who are appointed to act as the first directors are as follows:

Name	Address
Lloyd D. Hirschfeld	San Francisco, California.
Gerald D. Kennedy	San Francisco, California.
F. W. Wentworth	Oakland, California.
R. M. Underhill	Berkeley, California.
A. D. King	San Francisco, California.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

In Witness Whereof, we have hereunto set our hands this 27th day of August, 1934.

LLOYD D. HIRSCHFELD
Lloyd D. Hirschfeld
GERALD D. KENNEDY
Gerald D. Kennedy
F. W. WENTWORTH
F. W. Wentworth
R. M. UNDERHILL
R. M. Underhill
A. D. KING
A. D. King

State of California,
City and County of San Francisco.—ss.

On this 29th day of August, 1934, before me, Eugene P. Jones, a Notary Public in and for the City and County of San Francisco, State of California, residing therein and duly commissioned and sworn, personally appeared Lloyd D. Hirschfeld, Gerald D. Kennedy, F. W. Wentworth, R. M. Underhill and A. D. King, known to me to be the persons whose names are subscribed to and who executed the within instrument, and they acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] EUGENE P. JONES
Notary Public in and for the City and County of San Francisco, State of California.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

EXHIBIT "B"

By-Laws
of
One Thirty Three Geary Corporation
a California corporation

Article I.
Corporate Powers

The corporate powers, business and property of the corporation shall be vested in, and exercised, conducted and controlled by a Board of five (5) Directors, who need not be stockholders of the corporation.

Article II.
Officers

The officers of the corporation shall consist of a President, a General Manager, one or more Vice-Presidents, a Secretary, an Assistant Secretary, a Treasurer, and an Assistant Treasurer. The Board of Directors may from time to time create such other offices as they may deem advisable, and elect the incumbents thereof. All of the officers of the corporation shall hold office at the pleasure of the Board of Directors.

Article III.
Powers and Duties of Directors.

The powers and duties of the Board of Directors are:

(a) To appoint and remove at pleasure all of-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

ficers, agents and employees of the corporation, other than Directors, prescribe such duties for them as may not be inconsistent with law and these By-Laws, fix their compensation and require from them security for faithful service.

(b) To conduct, manage and control the affairs and business of the corporation, and to make such regulations therefor, not inconsistent with law and these By-Laws, as they may deem best.

(c) To fix, from time to time, the office of the corporation, to adopt, make and use a corporate seal, to prescribe the forms of the certificates of stock, and to alter the forms of such seal and certificates from time to time, as they may deem best.

(d) To issue or cause to be issued, at any time, and from time to time, certificates of stock.

(e) To sell and purchase, from time to time, shares of the capital stock of the corporation, upon such terms and conditions as to the Board of Directors shall seem desirable.

(f) To borrow money and incur indebtedness for the purposes of the corporation, and to cause to be executed and delivered therefor, in the corporate name, promissory notes and other evidences of debt.

(g) To call in and demand from the stockholders the sums by them respectively subscribed for capital stock, in such payments and at such times as they may deem proper.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

(h) Generally to do and perform every act and thing whatsoever that may pertain to the office of the Directors, and to exercise all the powers and perform all the acts which the corporation can legally exercise and perform under its Articles of Incorporation.

(i) To amend, alter, repeal or adopt new By-Laws of the corporation by simple majority vote.

Article IV.

Vacancies in the Board of Directors.

Section 1. Whenever any vacancy occurs in the office of Director, such vacancy may be filled by an appointee selected by a majority of the remaining Directors, even though less than a quorum, and the person so appointed shall hold office until his successor is elected. In case of an increase in the number of Directors, the Board of Directors shall have power to fill the new positions, and their appointees shall hold office until the next election of Directors by the stockholders, or until their successors have been elected.

Section 2. A vacancy in the Board of Directors shall be deemed to have occurred whenever a Director resigns either by presenting his written resignation to the Board or presenting such resignation orally at any meeting of the Board, or whenever a Director dies, or by judgment of a competent court is declared incompetent or insane, or whenever

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

any vacancy is created in accordance with any law of the State of California.

Article V.

Election of Directors.

The directors shall be elected annually by the stockholders, at the annual meeting of the stockholders. Their term of office shall begin immediately after election and shall continue until the next annual meeting of the stockholders or until their successors are elected. At all elections, or votes had for any purpose, there must be a majority of the subscribed capital stock represented, either in person or by proxy in writing.

Article VI.

President

The powers and duties of the President are:

(a) To preside at all meetings of the Board of Directors and of the stockholders.

(b) To call special meetings of the stockholders and also of the Board of Directors, at such times as he may deem proper.

(c) To sign as President of the Corporation all deeds, conveyances, mortgages, leases, promissory notes, contracts, obligations, certificates and other papers and instruments in writing that may require such signature, unless the Board of Directors shall otherwise direct, and to perform such other duties as the Board of Directors may determine.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

Article VII.

General Manager.

The powers and duties of the General Manager are to manage and operate the Whitney Building, negotiate and execute leases, collect rentals, hire and fire employees, make contracts with respect to operations, incur bills, and make expenditures for the regular operations of said building, and to do any and all things reasonably incidental to the management of said building, subject to the direction of the Board of Directors.

Article VIII.

Vice-Presidents.

The Vice-Presidents shall, in the event of the absence or disability of the President, perform the duties and exercise the powers of the President, and shall perform such other duties as the Board of Directors shall from time to time prescribe.

Article IX.

Secretary.

The powers and duties of the Secretary are:

(a) To keep a full and complete record of the proceedings of the Board of Directors and of the meetings of the stockholders.

(b) To keep the seal, books and papers of the corporation, and to affix the seal to all instruments executed by the President, or by direction of the Board of Directors, which may reasonably require it.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

(c) To sign, in conjunction with the President, or any Vice-Presidents, all certificates of stock, checks, drafts, promissory notes and other documents unless the Board of Directors shall otherwise direct.

(d) To receive any moneys belonging to or paid in to the corporation, and to receipt for the same, and to deposit so much thereof as may not be needed for current expenses or uses, with such depositary as the Board of Directors may designate.

(e) To make service and publication of all notices that may be necessary or proper, and without command or direction from anyone. In case of the absence, inability, refusal or neglect of the Secretary to make service or publication of any notice, then such notice may be signed, served and published by the President or any Vice-President, or by any person thereunto authorized by any of them, or by the Board of Directors.

(f) To supervise the keeping of the accounts and of the books of the corporation.

(g) To transfer upon the stock books of the corporation any and all shares of stock.

(h) Generally to do and perform all such duties as pertain to his office and as may be required by the Board of Directors, or by the President.

Article X.

Treasurer

The Treasurer shall perform such duties as may

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

be prescribed by the Board of Directors or the President.

Article XI.

Assistant Secretary.

The Assistant Secretary shall, in the event of the absence or disability of the Secretary, perform the duties and exercise the powers of the Secretary, and shall perform such other duties as the Board of Directors shall from time to time prescribe.

Article XII.

Assistant Treasurer.

The Assistant Treasurer shall, in the event of the absence or disability of the Treasurer, perform the duties and exercise the powers of the Treasurer, and shall perform such other duties as the Board of Directors shall from time to time prescribe.

Article XIII.

Stockholders' Meetings.

Section 1. There shall be a regular annual meeting of the stockholders of the corporation on the first Tuesday in March in each and every year, beginning with the year 1935, at 2:30 P.M. of said day, at the office of the corporation; provided, that should said meeting day fall upon a legal holiday, said meeting of the stockholders shall be held on the next day thereafter which is not a legal holiday, at the same hour and place. At said regular meeting, Directors of the corporation shall be elected to serve

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

for the ensuing year, and until their successors are elected. Notice of the annual meeting of stockholders, and of the election of Directors thereat, shall be given by mailing notice thereof at least five days prior to the date of meeting, addressed to each of the stockholders of the corporation at his place of business or residence as the same appears on the books of the corporation, or, in case no business or residence address of a stockholder appears on the books of the corporation, then directed to any address appearing on the books for such stockholder. No other or further notice shall be required.

Section 2. Special meetings of the stockholders may be called and held at any time by order of the President or any Vice-President of the corporation. Notice of a special meeting of the stockholders shall be given by mailing notice thereof at lease one day prior to the date of the meeting, addressed to each of the stockholders of the corporation as in the case of notice of the annual meeting. No other or further notice shall be required.

Section 3. At all meetings of the stockholders persons representing a majority of the subscribed capital stock, either in person or by proxy in writing, shall constitute a quorum; and at all such meetings each share of stock shall entitle the duly qualified holder thereof to one vote, except that in all elections of Directors, stockholders may cumulate their votes as provided by the laws of the State of Cali-

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

fornia. All proxies shall be in writing, subscribed by the party entitled to vote the number of shares represented thereby, or by his agent thereunto duly authorized in writing. No proxy shall be valid or confer any right or authority to vote or act thereunder, unless such proxy has been offered for filing to, and left with, the Secretary of the corporation prior to the meeting at which the same is to be used; provided, that in case any meeting of the stockholders whatsoever shall have been for any cause adjourned, such proxies shall be valid and may be used at such adjourned meeting which have been offered for filing to, and left with, the Secretary of the corporation prior to the date at which said adjournment meeting shall be in fact held. Any business which might be done at a regular meeting of the stockholders may be done at a special or at an adjourned meeting. If no quorum be present at any meeting whatsoever of the stockholders, such meeting may be adjourned by those present from day to day or from time to time, until a quorum is present, such adjournment and the reasons therefor being recorded in the record of proceedings of the stockholders.

Article XIV.

Directors' Meetings.

Section 1. All meetings of the Board of Directors shall be held at the office of the corporation or at such other place or places as may be designated

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

by resolution of said Board. Regular meetings of the Board of Directors shall be held at the office of the corporation on the first Tuesday of each month, at 2:30 P.M. without other or further notice from this By-Law; provided, however, that should said meeting day at any time fall upon a legal holiday, such meeting shall be held upon the next day thereafter which is not a legal holiday, at the same hour and place.

Section 2. Special meetings of the Board of Directors may be called at any time by order of the President or any Vice-President of the corporation. Notice of a special meeting of the Board of Directors shall be given each Director by leaving written or typewritten notice of the time and place thereof at his place of business or residence, at least one day prior to such meeting, or by depositing the same, with the postage thereon prepaid, in the United States mail at the principal place of business of the corporation, addressed to him at his place of business or residence, as the same appears on the books of the corporation, or, in case neither his business nor residence address appears on the books, then directed to any address appearing on the books for him, any such mailing to be at least one day before the day fixed for holding said meeting. The leaving or mailing of notice as aforesaid shall be due, legal and personal notice to such Director. No further or other notice shall be required. Any business which may be done at

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

a regular meeting of the Board of Directors may be done at a special or an adjourned meeting of the Board.

Section 3. The Board of Directors elected at any annual meeting of the stockholders shall meet immediatetly after the adjournment of such stockholders' meeting, and organize by the election of officers. No notice of such meeting need be given.

Article XV.

Amendments.

The power to amend, alter or repeal the By-Laws of the corporation and to adopt new By-Laws is hereby delegated to the Board of Directors of the corporation.

Article XVI.

Annual Reports Dispensed With.

The annual reports to shareholders, provided for by Section 358 of the California Civil Code as amended in 1931, are hereby dispensed with.

Know All Men by These Presents:

That we, the undersigned, being all of the Directors of One Thirty Three Geary Corporation, a corporation organized and existing under the laws of the State of California, hereby consent to and approve the foregoing Code of By-Laws, and do hereby adopt the same as the By-Laws of said corporation.

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

Dated: September 18th, 1934.

LLOYD D. HIRSCHFELD
GERALD D. KENNEDY
A. D. KING
ROBERT M. UNDERHILL

....

Know All Men by These Presents:

That I, the undersigned, the Secretary of One Thirty Three Geary Corporation, a corporation organized and existing under the laws of the State of California, do hereby certify that the foregoing Code of By-Laws was duly and regularly adopted as the By-Laws of said corporation on the 18th day of September, 1934, by the Directors of said corporation, and that the same do now constitute the By-Laws of said corporation.

WELLINGTON HENDERSON
Secretary.

EXHIBIT "C"

Number .... Shares ....

One Thirty Three Geary Corporation
Incorporated Under the Laws of the
State of California,
September 4, 1934.
Capital Stock: 12,000 Shares
No Par Value.

This Certifies That ....
is the owner of ....

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

Shares of the Capital Stock of One Thirty Three Geary Corporation, transferable only on the books of this Corporation in person or by Attorney upon surrender of this Certificate property endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and its Corporate Seal to be hereunto affixed this .... day of .... A. D. 19.....

....

President.

....

Secretary.

(On Reverse Side)

For Value Received, ... hereby sell, assign and transfer unto ....

.... Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appiont ....

to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated: ...., 19.....

....

In Presence of

....

Notice: The signature of this assignment must correspond with the name as written upon the face

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

EXHIBIT "D"

Resolved, that this corporation, One Thirty Three Geary Corporation, issue eleven thousand one hundred thirty (11,130) shares of its stock, without par value, to Lloyd D. Hirschfeld, Gerald D. Kennedy, F. W. Wentworth, R. M. Underhill and A. D. King, as Committee under The Whitney Estate Company Bondholders' Deposit Agreement, in consideration of the conveyance and transfer to this corporation of all assets and property of every kind and nature whatsoever held by said Committee, including the Whitney Building, 133 Geary Street, San Francisco, California, subject to all obligations and liabilities of said Committee, all of which shall be assumed by this Corporation concurrently with said conveyance and transfer; and, be it

Further Resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation, be and they are hereby authorized and empowered, for and on behalf of this corporation and as its corporate act and deed, to execute and cause to be filed an application to the Department of Investment, Division of Corporation of the State of California, for a permit authorizing the issue of shares of stock of this corporation as

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

aforesaid, and to execute any and all instruments and to do and perform any and all other acts and things deemed by them necessary or desirable to effecte the issue of said stock and to carry out the purposes of this resolution; and, be it

Further Resolved, that the Board of Directors of this corporation does hereby determine the fair value to this corporation of said consideration to be received for the issue of said shares, to be the sum of $667,800.

EXHIBIT "E"

THE WHITNEY ESTATE COMPANY BONDHOLDERS PROTECTIVE COMMITTEE BALANCE SHEET AS OF AUGUST 31, 1934

ASSETS

Cash in Banks		$ 13,046.63
Notes and Accounts Receivable		9,505.27
Notes Receivable (for rents prior to foreclosure)	$6,441.43	
Accounts Receivable—Current	1,097.17	
Due from Depository—a/c Bonds deposited under agreement	1,966.67	
Total Current Assets		$ 22,551.90
Land and Building—133 Geary Street		667,800.00
Foreclosure Expense		4,863.71
Unexpired Insurance		4,482.88
		$609,698.49

LIABILITIES

Accounts Payable—Current	$ 3,405.23
Mortgage Note Payable	47,000.00
Total Liabilities	$ 50,405.23

(Testimony of Lloyd D. Hanford.)

Plaintiff's Exhibit No. 6—(Continued)

Net Worth: Represented by Certificates of Deposit of $1,115,000.00 par value old bonds	$649,293.26
	$699,698.49

[Endorsed]: Filed 7/10/42.

Mr. Ellis: I now offer in evidence a copy of an amendment to the application dated November 1, 1934, as Plaintiff's Exhibit 7.

(The document was marked "Plaintiff's Exhibit 7.")

PLAINTIFF'S EXHIBIT No. 7

(Stamped) Division of Corporations Received Nov 1 1934 San Francisco Office

Before the Department of
Investment
Division of Corporations
of the
State of California

In the Matter of the Application of

ONE THIRTY THREE GEARY
CORPORATION,

for a Permit Authorizing it to Issue Securities.

Amendment to Application

This Amendment to the application of One Thirty Three Geary Corporation respectfully shows:

(Testimony of Lloyd D. Hanford.)

1. Applicant has heretofore filed with the Division of Corporations an application for a permit to issue eleven thousand one hundred thirty (11,130) shares of its stock to the Bondholders Committee under The Whitney Estate Company Bondholders Deposit Agreement. Said application and all of the exhibits thereto are hereby referred to and incorporated herein by this reference.

2. Since the filing of said application, the Bondholders Committee therein referred to has been requested to accept two additional bonds of the par value of One thousand Dollars ($1,000) each for deposit, and has expressed its willingness to do so. In order that there may be issued to the Committee a sufficient number of applicant's shares to enable it to distribute shares of applicant's stock to the holders of said two bonds on the same basis on which such shares will be distributed to other depositing bondholders, it will be necessary for applicant to issue eleven thousand one hundred fifty (11,150) shares of its stock to the Committee in lieu of eleven thousand one hundred thirty (11,130) shares, as prayed for in said application.

3. Attached hereto and marked Exhibit "A" is a copy of a resolution of applicant's Board of Directors authorizing the filing of this amendment to application.

Wherefore, applicant prays that the prayer of said application be amended so as to request that a permit be issued authorizing applicant to issue eleven thousand one hundred fifty (11,150) shares

(Testimony of Lloyd D. Hanford.)

of its stock to the Bondholders Committee therein referred to, upon the terms and conditions therein set forth.

Respectfully submitted,

ONE THIRTY THREE GEARY CORPORATION

(Signed) By LLOYD D. HIRSCHFELD
Vice-President

(Signed) By IRMA L. DITO
Assistant Secretary

(Signed) BROBECK PHLEGAR & HARRISON
Attorneys for Applicant.

State of California,
City and County of San Francisco—ss.

Lloyd D. Hirschfeld, being first duly sworn, deposes and says:

That he is an officer, to wit, the Vice-President, of One Thirty Three Geary Corporation, a corporation, the applicant named in the foregoing amendment to application, and as such is authorized to verify the said application; that he has read the same application and knows the contents thereof, and that the same is true.

(Signed) LLOYD D. HIRSCHFELD

Subscribed and sworn to before me this 1st day of November, 1934.

[Seal] EUGENE P. JONES (Signed)
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: Q. Mr. Hanford, the original application called for the issuance of 11,130 shares of stock of the new corporation. [16] The amended application called for the issuance of 11,150 shares of stock. Will you explain the reason for the increase?

A. Yes. There was one owner of two bonds who said that they felt they had been slighted, they never received any money, and they stated they were not dissenting bondholders, but assenting bondholders, and they felt they should have the privilege of being members of the new corporation, which we agreed and consented to.

Mr. Ellis: I made a copy of the permit which I intended to put in evidence and I left it in my office. Do you have a copy?

Miss Phillips: I may have.

Mr. Ellis: So I can put it in evidence. Will it be stipulated that a copy of the permit issued by the Corporation Commissioner may be deemed in evidence as Plaintiff's Exhibit next in order, and we will bring it out sometime during the afternoon?

Miss Phillips: Yes; that is all right.

(The document was marked "Plaintiff's Exhibit 8.")

(Testimony of Lloyd D. Hanford.)

PLAINTIFF'S EXHIBIT No. 8

Before the
Department of Investment
Division of Corporations
of the
State of California

PERMIT

In the matter of the application of

ONE THIRTY THREE GEARY CORPORATION

for a permit authorizing it to sell an issue its securities.

File No. 52337SF
Receipt No. SF-5935

This Permit Does Not Constitute a Recommendation or Endorsement of the Securities Permitted to Be Issued, But Is Permissive Only.

The applicant filed its application for the issue and sale of securities as hereinafter set forth on the 8th day of October, 1934. A hearing was held on the 1st day of November, 1934, upon the fairness of the terms and conditions of such issue and sale, at which hearing all persons to whom it is proposed to issue said securities had the right to appear, and thereafter, on the 2nd day of November, 1934, the Commissioner of Corporations made and filed his findings of fact and conclusions which are incorporated herein by this reference.

(Testimony of Lloyd D. Hanford.)

One Thirty Three Geary Corporation is hereby authorized:

1. To sell and issue to the bondholders committee and/or to the depositing bondholders referred to in said application on aggregate of not to exceed 11,150 shares of its capital stock in exchange for the property described in said application, subject only to the indebtedness or encumbrance therein described.

This permit is issued upon the following condition:

(a) That unless sooner revoked, suspended or extended by alteration or amendment, upon such terms and conditions as the Commissioner may deem proper, all authority to sell securities under issuance clause 1 of this permit shall terminate and expire on the 2nd day of May, 1935. All other issuance clauses and/or conditions of this permit shall remain in full force and effect until revoked, suspended, altered or amended by appropriate order of the Commissioner.

Dated: San Francisco, California,
November 2, 1934.

[Seal] EDWIN M. DAUGHERTY
Commissioner of Corporations
By IVAN T. CRASE
Assistant Commissioner

AM:NB

[Endorsed]: Filed 7/10/42.

(Testimony of Lloyd D. Hanford.)

Mr. Ellis: May it be stipulated, Miss Phillips, that on November 1, 1934, a hearing was held by the Corporation Commissioner of the State of California, upon the fairness of the terms and conditions upon which the stock of 133 Geary Corporation was being issued?

Miss Phillips: Yes.

Mr. Ellis: Will it be further stipulated that the permit was issued on November 2nd, 1943?

Miss Phillips: So stipulated.

Mr. Ellis: Q. Now, the permit, Mr. Hanford, authorized the issuance of 11,150 shares of the stock of the new corporation. What did that represent, so far as deposit of bonds were concerned? [17]

A. It represents ten shares of stock for every $1000 par value of bonds.

Q. Or one share for every $100.

A. Correct.

Q. When you say a bond, you mean a deposited bond? A. That's right.

Q. Other than these two bonds that you have referred to which necessitated the amendment of the application were any bonds accepted by the committee for deposit after the date of the trustee's sale?

A. There were none tendered and none accepted.

Q. Do you know the date, Mr. Hanford, when the new corporation issued its stock pursuant to the permit?

A. November 30, 1934.

Q. How was that stock issued?

A. The original certificate for 11,150 shares of

(Testimony of Lloyd D. Hanford.)

stock was issued to the bondholders protective committee of the Whitney Estate Company.

Q. Then what did the committee do with the stock?

A. The committee then transferred the stock in the proportion of one share per $100 par value of bonds owned by the depositing bondholders.

Q. Was the property acquired by the new corporation *submit* to any liability?

A. Well, may I explain my recollection of the financial status? I think there was to be a mortgage on the property for some amount in the neighborhood of sixty to seventy-five thousand dollars.

Mr. Ellis: May I lead the witness, Miss Phillips?

Miss Phillips: Yes.

Mr. Ellis: Q. It is a fact, isn't it, Mr. Hanford, that the property was acquired subject to certain liabilities which were referred to in an exhibit attached to the application for a permit?

A. Yes.

Q. Those liabilities consisted of operating expenses which had [18] been incurred during the period of the receivership and its subsequent operation during your tenure as manager? A. Yes.

Q. And also a $47,000 indebtedness secured by a mortgage? A. Yes.

Q. That $47,000 represented, did it not, a residue of the monies that had to be borrowed by the committee to pay off non-depositing bondholders?

A. That money was used to pay off the non-depositing bondholders.

(Testimony of Lloyd D. Hanford.)

Q. The money was originally borrowed from the American Trust Company by the committee?

A. I believe it was the American Trust Company.

Q. Subsequently, the American Trust Company's indebtedness was paid off with funds borrowed from the Crocker Bank? A. Correct.

Q. And the mortgage was taken by the Crocker bank?

A. I think it was either a mortgage or deed of trust.

Q. One or the other. The specific assets that were turned over to the new corporation were the Whitney Building and the land on which it was situated, and certain cash that had been derived from operations?

A. Yes, plus some personal property that was usable for the operation of the Whitney Building.

Q. It was an office building, was it not?

A. Yes, sir.

Q. And furniture mostly belonged to the tenants?

A. Well, there was some office furniture, and filing cabinets and things.

Mr. Ellis: Will it be stipulated, Miss Phillips, that at the date of the trustee's sale, February 28, 1934, the fair market value of the Whitney Building and the land upon which it was situated was less than $900,000?

Miss Phillips: Yes. [19]

Mr. Ellis: Q. Mr. Hanford, you have been

(Testimony of Lloyd D. Hanford.)
thoroughly familiar with the Whitney Building in this locality ever since the formation of the committee. A. Yes, I have.

Q. Were you familiar with it before the formation of the committee? A. Yes, I was.

Q. You were the manager of the property from the date of the discharge of the receiver until after the new corporation took over? A. Yes.

Q. You remained as manager of the property after the new corporation took over? A. Yes.

Q. And from your knowledge of the building, itself, and your knowledge of real estate value which you have gained as a real estate broker, can you state whether there was any moment between *between* the date of the default and the date when the new corporation took the property over that the property was of a greater market value than $900,000?

A. I would say that between the time of the default and the time of the formation of the new company—is that it?

Q. Yes.

A. That it was never worth in excess of $900,000 at that time.

Q. Through your participation as a member of the committee you became pretty well familiar with the financial affairs of the Whitney Estate Company? A. Yes.

Q. Do you know whether between the date of the default and the date of the trustee's sale the Whitney Estate Company had any assets of any substan-

(Testimony of Lloyd D. Hanford.)
tial value outside of the Whitney Building and the land upon which it was situated?

A. We made an investigation of that very point and determined to the satisfaction of all members of the committee that there was no financial reserve there, at all. [20]

Q. In other words, you do know that from April 15, 1933, to and including, we will say, the date when the new corporation took over the property, you do know that the aggregate value of all the assets of Whitney Estate Company were less than the principal amount of the outstanding bonds?

A. Yes; we were reasonably well satisfied of that condition.

Q. You have in your hand, I believe, Mr. Hanford, the ledger sheets of Santa Inez Company showing the acquisition of Whitney Estate Company bonds? A. Yes.

Q. Do you keep the books of the Santa Inez Company?

A. Yes, I do. There is an auditor, but I keep all records of the Santa Inez Company.

Q. Referring to the ledger sheets which you have, can you state the aggregate principal amount of bonds of Whitney Estate Company owned by Santa Inez Company on February 28, 1934?

A. $136,00 par value.

Q. All of those bonds were deposited bonds?

A. On February 28, 1934, yes, they were all deposited bonds.

(Testimony of Lloyd D. Hanford.)

Q. The Santa Inez Company actually held, physically, certificates of deposit? A. Yes.

Q. Representing those bonds?

A. We had been buying them continuously over that period and we either bought certificates of deposit or actual bonds which we then deposited.

Q. Can you state from the ledger sheet the aggregate cost of those bonds to the Santa Inez Company?

A. According to this ledger sheet it was $59,401.28.

Q. My record shows $59,421.28.

A. There was $20 paid on April 7th, which was a purchase commission on account of bonds purchased up to that time, but that was not paid until April 7th of 1934, that $20. [21]

Q. Did it relate to a transaction that was before——

A. Yes, that related to one of these purchases that was before, because no bonds were bought after February 2nd, until May, 1934.

Q. So is it correct, Mr. Hanford, that the total cost to Santa Inez Company of the $136,000 principal amount of Whitney Estate Company bonds to which you have just testified was $59,421.28?

A. Yes, that's right.

Q. Is it a fact that on December 10, 1934, Santa Inez Company exchanged its certificates of deposit representing the $136,000 principal amount of Whitney Estate Company bonds for 1360 shares of the capital stock of 133 Geary Corporation?

A. That's right.

(Testimony of Lloyd D. Hanford.)

Q. Did Santa Inez Company receive any other consideration in exchange for those certificates of deposit? A. No.

Cross-Examination

Miss Phillips: Q. Mr. Hanford, I take it that your agreement with the Whitney Estate Company called for the litigation to be dismissed and for the bondholders not to take a deficiency judgment against the Whitney Estate Company; is that right?

A. I don't recall the matter of the deficiency, because my big concern as a member of the bondholders committee was to clear the title of that property.

Q. Isn't it a fact no judgment was taken against the Whitney Estate Company.

A. No, it was not.

Mr. Ellis: Miss Phillips, if you are endeavoring to bring that matter out, the amount of that lien, I offered evidence that indicates that the agreement was that no deficiency judgment should be taken. I will stipulate to that, if you like.

Miss Phillips: Yes.

Q. Did you say the Whitney Estate Company had no property other than this building?

A. We were told they owned a ranch some- [22] where in California that was also heavily mortgaged, and at that time we were also advised that the value of the equity of that ranch was very questionable, and the possibility of realizing anything on that ranch was extremely doubtful, considering the expense that might be involved in attempting to pro-

(Testimony of Lloyd D. Hanford.)

ceed with the deficiency. That was the reason we dropped the idea of taking a deficiency.

Q. In other words, regardless of the property which the Whitney Estate Company had, your committee decided it was not going to try to get a deficiency?

A. Well, we decided it wasn't——

Q. Worth while?

A. Wasn't worth while.

Q. The reason I asked that question is I have the Whitney Estate Company's tax return for 1935, and I am just considering what income they reported the following year. I am wondering how far the committee went. I don't know that it is of any importance. As a matter of fact, as long as counsel has agreed it is not a reorganization he is relying on, I wonder if counsel will agree that the Whitney Estate Company actually continued in business thereafter and it held property and reported income and so on? Here is their return for 1935. They lost money in 1935, but they took in, according to this return, $21,000.

Mr. Ellis: I will stipulate.

Miss Phillips: They actually did continue in business?

Mr. Ellis: Yes.

Miss Phillips: I notice they had sheep that they were shearing and oranges they were selling. How much cash had to be paid to the dissenting bondholders, Mr. Hanford?

A. I don't quite recall that. We had in excess

(Testimony of Lloyd D. Hanford.)
of 94 per cent, I bleieve it was, of all the bondholders depositing. There was slightly around 6 per cent of dissenting bondholders. [23]

Q. So when the title to the property was actually cleared on the 133 Geary Corporation, that is the new corporation, you had just the mortgage on the building and a few debts to take care of which had been incurred during the period of receivership?

A. Correct.

Q. The dissenting bondholders were few enough that the mortgage was of no consequence to a building of that size? A. That's right.

Miss Phillips: I think that is all I have to ask.

Redirect Examination

Mr. Ellis: Q. Mr. Hanford, just to clear this point up that Miss Phillips brought out, the committee determined not to proceed against the Whitney Estate Company on a deficiency judgment, not just out of the goodness of its heart, but because of advice that nothing could be gained by that; is that correct? A. Well, that is correct.

Q. This mortgage or deed of trust that Crocker Bank had was subsequently paid off? A. Yes.

Q. During the period in which you were manager of the building at 133 Geary, the new corporation?

A. Well, I believe some of it was paid off later, but it was eventually paid off during the operation of that property, or by the 133 Geary Corporation.

Mr. Ellis: That is all.

Miss Phillips: That is all.

Mr. Ellis: Miss Phillips, there were certain formal allegations at the end of our complaint, and I thought I might make a statement regarding them. I am the vice-president of Santa Inez Company, and I know these facts, and instead of testifying may I make the statement that I know of my own [24] knowledge that no assignment or transfer of the claim which is the subject matter of this action has itself been made by plaintiff, and that plaintiff is the sole owner of such claim, and I may further say there is no just credit or offset against the claim which is known to me or to the officers, any of the officers of Santa Inez Company. I assume you have a photostatic copy of the tax return you referred to?

Miss Phillips: Yes, I have.

Mr. Ellis: Both the original and the amended return?

Miss Phillips: I think so, for the year 1934, do you mean?

Mr. Ellis: Yes. I offer in evidence as Plaintiff's Exhibit next in order and as a single exhibit the original and amended return for the year 1934, filed by plaintiff with the Collector of Internal Revenue, and may the record show that these were produced from the files of the defendant?

(The documents were marked Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT No. 9

United States [Cut] of America
Treasury Department
Washington

June 9, 1941

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed are true copies of Corporation Income and Excess-Profits Tax Return for 1934, (with statements and schedules attached) filed by Santa Inez Company, San Francisco, California; "Amended Corporation Income and Excess-Profits Tax Return for 1934, (with schedule attached) filed by Santa Inez Company, San Francisco, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] F. A. BIRGFELD,
F. A. Birgfeld,
Chief Clerk, Treasury Department.

(illegible)

HSF Wmb WMBaur SSF JPW H

Plaintiff's Exhibit No. 9—(Continued)

Computation Proved [Stamp]: Field

Form 1094 Must Be Filed With This Return

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

Form 1120

Treasury Department
Internal Revenue Service
(Auditor's Stamp)
Closed
No Additional Tax
Date of RAR. ....
Auditor ....
Div.....Sec.....E....Unit....3
Date ....
Reviewer ....
Date ....

[In pencil]: See adjustments made on amended return.

See adjusts.

For Calendar Year 1934 or Fiscal Year

begun .... 1934, and ended...................., 1935

Print Plainly Corporation's Name and Business Address

SANTA INEZ COMPANY
(Name)

111 SUTTER STREET
(Street and number)

SAN FRANCISCO CALIFORNIA
(Post Office and State)

It is Essential, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled in Irrespective of Any Statements, Schedules, or Reports Submitted Herewith

Date of Incorporation—March 2, 1932
Under the Laws of what State or County—California

[In pencil]: RWR 35
Page 1 of Return

Form 1094 Filed with return
File Code 1255
Serial Number 400488
District 1—Calif.
(Cashier's Stamp)

[Stamp]: Revenue Agent in Charge Received May 24 1936 San Francisco

[Stamp]: Revenue Agent in Charge Received Jun 6 1938 San Francisco

[Stamp]: Received with Remittance Mar. 13 1935
Collector of Int. Rev.
First Dist. Calif
Cash Check M.O.
Cert. of Ind.
First Payment
$..

Plaintiff's Exhibit No. 9—(Continued)

1934—(Continued) Page 1 of Return—(Continued)

The Corporation's Books are in Care of..Located at ....
Kind of Business (in detail)—Investments. Is This a Consolidated Return of Railroad Corporations? No.
(Also check industrial division on page 3)

If so, of How Many Corporations?..................................If a Foreign Corporation, State Whether Resident or Nonresident ....; If Nonresident, State Amount of Income Excluded (Instruction 33) From Gross Income, $.................... [In pencil]: 246.75 Is the Corporation a personal holding corporation within the meaning of Section 351 of the Revenue Act of 1934? Yes. (If so, an additional return on Form
(Answer "Yes" or "No")
1120 H must be filed.) [Stamp]: Attached to 1935 Return [Marginal Note]: Attach Remittance Here

Item and Instruction No.

GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), $..............; Less Returns and Allowances, $..............; Net Sales $..................
2. Less Cost of Goods Sold:
   (a) Inventory at beginning of year ....$..................
   (b) Material or merchandise bought for manufacture or sale.... ....
   (c) Miscellaneous costs (From Schedule A, Column 1):
      (1) Salaries and wages, $....................; (2) Other costs, $................; Total ....

Plaintiff's Exhibit No. 9—(Continued)

1934—(Continued) Gross Income—(Continued) Page 1 of Return—(Continued)

Item and Instruction No.			
	(d) Total of lines (a), (b), and (c)	$........	
	(e) Less inventory at end of year	....	
3.	Gross Profit from Sales (Item 1 minus Item 2)		$........
4.	Gross Receipts (where Inventories are not an income-determining factor)	$........	
5.	Less cost of operations (From Schedule A, Column 2): (a) Salaries and wages, $........; (b) Other costs, $........; Total	....	
6.	Gross Profit where inventories are not an income-determining factor (Item 4 minus Item 5)		....
7.	Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.		4,716.37
8.	Rents		....
9.	Royalties		....
10.	Capital Gain or Loss (From Schedule B)		10,997.63
11.	Interest on Liberty Bonds, etc., (From Schedule J)		....
12.	Dividends on Stock of:		
	(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934		....

Plaintiff's Exhibit No. 9—(Continued)

1934—(Continued) Gross Income—(Continued) Page 1 of Return—(Continued)

Item and Instruction No.			
	(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934	....	
	(c) Foreign Corporations		
13.	Other Income (State nature of Income) (Use separate schedule, if necessary)	....	
14.	Total Income in Items 3, and 6 to 13, inclusive		$ 15,714.00

DEDUCTIONS

15.	Compensation of Officers (From Schedule C)	$............	
16.	Rent on Business Property	....	
17.	Repairs (from Schedule D): (a) Salaries and Wages, $............; (b) Other Costs, $............; Total	....	
18.	Interest	1,090.71	
19.	Taxes (From Schedule E)	238.44	
20.	Losses by Fire, Storm, etc. (From Schedule F)	....	
21.	Bad Debts (From Schedule G)	....	
22.	Dividends (Item 12 (a) above)	....	

Plaintiff's Exhibit No. 9—(Continued)

1934—(Continued) Item and Instruction No.	Deductions—(Continued)	Page 1 of Return—(Continued)	
23.	Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	....	
24.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 24)	....	
25.	Other Deductions Authorized by Law (Explain below, or on separate sheet)		
	(a) Salaries and wages. (Not included in Items 2, 5, 15, or 17 above)	3,500.00	
	(b) Other Expenses	3,715.79	
26.	Total Deductions in Items 15 to 25		8,544.94
27.	Net Income (Item 14 minus Item 26)		$ 7,169.06

03

Plaintiff's Exhibit No. 9—(Continued)

1934—(Continued) COMPUTATION OF TAX Page 1 of Return—(Continued)

Income Tax

28. Net Income (Item 27, above) .... $ 7,169.06
29. Less Interest on Liberty Bonds, etc. (Item 11) ....
30. Balance subject to Income Tax (Item 28 minus Item 29) .... $ 7,169.06
31. Income Tax (13¾% of Item 30) (or 15¾% of Item 30, if this is a consolidated return of railroad corporations) .... $ 985.75
32. Less: Income Tax Paid at Source. (This credit can be allowed only to a nonresident foreign corporation....$...........
33. Income Tax Paid to a Foreign Country or U. S. Possession by a Domestic Corporation) ....
34. Balance of Income Tax (Item 31 minus Items 32 and 33) .... $ 985.75

Excess-Profits Tax

35. Net Income for Excess-profits Tax Computation (Item 27, above) ....$ 7,169.06
36. Less: 12½% of $120,999. value of capital stock as declared in your capital-stock tax return for year ended June 30, 1934 .... 15,124.88
37. Amount Subject to Excess-profits Tax (Item 35 minus Item 36) .... Nil
38. Excess-profits Tax (5% of Item 37) Nil

Note.—Separate computation of Excess-profits Tax must be made on Form 1120 by each member of an affiliated group of railroad corporations making a consolidated Income Tax return.

Plaintiff's Exhibit No. 9—(Continued)

Page 2 of Return

Schedule K—BALANCE SHEETS (see Instruction 44)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
ASSETS				
1. Cash		$ 8,051.23		$ 4,697.46
2. Notes receivable				2,500.00
3. Accounts receivable	$		$	
(a) Less reserve for bad debts		6,000.00		
4. Inventories:				
(a) Raw materials	$		$	
(b) Work in process				
(c) Finished goods				
(d) Supplies				
5. Investments (nontaxable):				
(a) Obligations of a State, Territory, or any political subdivision thereof, or District of Columbia, or United States possessions	$ 75,599.92		$164,793.77	

Plaintiff's Exhibit No. 9—(Continued)

Page 2 of Return—(Cont'd) Schedule K—Balance Sheets—(Continued)

Assets—(Continued)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
(b) Obligations of instrumentalities of the United States	178,888.19		122,731.25	
(c) Obligations of the United States		254,488.11		287,525.02
6. Other investments:				
(a) Stocks of domestic corporations	$		$	
(b) Bonds of domestic corporations				
(c) Stocks and bonds of foreign corporations				
(d) All other investments or loans				
7. Deferred charges:				
(a) Prepaid insurance	$		$	
(b) Prepaid taxes				
(c) All other				
8. Capital assets:				
(a) Land	$		$	
(b) Buildings				

Plaintiff's Exhibit No. 9—(Continued)

Page 2 of Return—(Cont'd) Schedule K—Balance Sheets—(Continued)

Assets—(Continued)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
(c) Machinery and equipment	....		....	
(d) Furniture and fixtures	....		....	
(e) Delivery equipment	....		....	
....	....		....	
....	....		....	
	$........		$........	
(f) Less reserves for depreciation (except on land)	....	....	....	....
9. Patents		....		....
10. Good will		....		....
11. Other assets (describe fully):				
Deposit a/c purchase of securities	$........		$ 9,000.00	
....	....		....	
....	....	....	....	9,000.00
12. Total Assets	....	$268,539.34		$303,722.48

Plaintiff's Exhibit No. 9—(Continued)

Page 2 of Return—(Cont'd) Schedule K—Balance Sheets—(Continued)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
LIABILITIES				
13. Notes payable (less than one year)		$ 20,000.00		$ 60,000.00
14. Accounts payable		44,199.45		45,985.75
15. Bonds and notes (not secured by mortgage)			[In pencil]	45,000.00
16. Mortgages (including bonds and notes so secured)				
17. Accrued expenses:				
(a) Interest	$		$	
(b) Taxes				
(c) All other				
18. Other liabilities (describe fully):				
	$		$	
19. Capital stock:				
(a) Preferred stock (less stock in treasury)	$		$	
(b) Common stock (less stock in treasury)		100,000.00		100,000.00

Plaintiff's Exhibit No. 9—(Continued)

Page 2 of Return—(Cont'd) Schedule K—Balance Sheets—(Continued)

Liabilities—(Continued)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
20. Surplus Paid In	$100,000.00		$100,000.00	
21. Undivided profits	4,339.89	104,339.89	2,263.27	97,736.73
22. Total Liabilities		$268,539.34		$303,722.48

Remarks

Plaintiff's Exhibit No. 9—(Continued)

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

Page 3 of Return

1. Net income from Item 27, page 1 of the return .... $ 7,169.06
2. Nontaxable income:
   (a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions ....
   (b) Interest on obligations of the United States (except interest in excess of exemption as reported in Schedule J (e)) ....
   (c) Dividends deductible under Section 23 (p) of the Revenue Act of 1934 ....
   (d) Proceeds of life insurance policies paid upon the death of the insured ....
   (e) Other items of nontaxable income (to be detailed):
      (1) ....
      (2) ....
      (3) ....
3. Charges against reserve for bad debts, if Item 21, page 1 of return, is not an addition to a reserve ....
4. Charges against reserves for contingencies, etc. (to be detailed):
   (a) ....
   (b) ....
   (c) ....
5. Total of lines 1 to 4, inclusive .... $........
6. Total from Line 14 .... 985.75

[In pencil]: 7169.06

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—(Continued) Page 3 of Return—(Cont'd)

7. Net profit or loss for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6) (if loss, indicate) .... $ 6,183.31
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year 4,339.89

   [In pencil]: 4339.89
9. Other credits to surplus (to be detailed):
   (a) ....
   (b) ....
   (c) ....

   [In pencil]: 11,508.95
10. Total of Lines 7 to 9, inclusive........ $10,523.20

    [In pencil]: 13,772.22
11. Total from Line 17........ 12,786.47
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11) .... $ 2,263.27
13. Unallowable deductions:
    (a) Donations, gratuities, and contributions .... $........
    (b) Income and profits taxes paid to the United States, and such taxes paid to its possessions or foreign countries if claimed as a credit in whole or in part in Item 33, page 1 of the return.... ....
    (c) Federal taxes paid on tax-free covenant bonds ....
    (d) Special improvement taxes tending to increase the value of the property assessed ....

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—(Continued) Page 3 of Return—(Cont'd)

13. (Continued)
    - (e) Furniture and fixtures, additions, or betterments treated as expenses on the books.......... ....
    - (f) Replacements and renewals ....
    - (g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary ....
    - (h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation.......... ....
    - (i) Additions to reserve for bad debts which are not included in Item 21, page 1 of return.......... ....
    - (j) Additions to reserves for contingencies, etc. (to be detailed):
      - (1)..................

13. (i)—(Continued)
    - (2)..................
    - (3)..................
    - (k) Other unallowable deductions (to be detailed):
      - (1) Federal tax on 1934 income 985.75
      - (2)..................
      - (3)..................

14. Total of Line 13 ....$ 985.75

15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):
    - (a) Date paid 12/26/34 Character Cash $12,000.00
    - (b) Date paid.......... Character.......... ....
    - (c) Date paid.......... Character.......... ....
    - (d) Date paid.......... Character.......... ....

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—(Continued) Page 3 of Return—(Cont'd)

16. Other debts to surplus (to be detailed):
    (a) Federal Tax on 1933 Income.... 786.47
    [In pencil]: Arrow pointing from 13. (k) (1).

16. (Continued)
    (b)..
    (c)..

17. Total of Lines 15 and 16....................$12,786.47

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDEAR YEAR 1933 OR FISCAL YEAR 1934

1. Net Income ....$ 5,719.76 (or deficit ....$......................)

NATURE OF BUSINESS

2. Check the block to indicate the industrial division in which the corporation's main income producing business falls:

( ) Agriculture and related industries, including fishing, forestry, ice - harvesting; leasing such properties.

( ) Mining and quarrying, including gas and oil wells; leasing such properties.

Manufacturing

Food and kindred products:

( ) Bakery and confectionery products.

( ) Canned products — fish, fruit, vegetables, poultry.

Manufacturing—(Cont'd)

( ) Mill products—bran, flour, feed.

( ) Packing-house products—meats, lard; slaughtering.

( ) Sugar — beet, cane, maple; molasses, sirups; refining.

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—Nature of Business—(Continued) Page 3 of Return—Cont'd

Manufacturing—(Con.)

( ) Other food products—butter substitutes, cereals, coffee, spices, dairy products; artificial ice, etc.
( ) Beverages, soft drinks, mineral water.
( ) Brewing and distilling—alcohol, liquors, beer, malt extract, wines.
( ) Tobacco products.
Textiles:
( ) Cotton goods—dress goods, etc.; napping, dyeing.
( ) Woolen and worsted goods — dress goods, etc.; wool pulling, scouring.
( ) Silk and rayon goods—dress goods, thrown silk, etc.; spinning, warping.

Manufacturing—(Con.)

( ) Carpets, floor coverings, tapestries, linoleum.
( ) Other textiles — cord, felt, fur, linen, artificial leather, surgical textiles, etc.
( ) Clothing — custom-made, factory-made; underwear, millinery, etc.
( ) Knit goods — sweaters, hosiery, etc.
( ) Leather boots, shoes, slippers, etc.
( ) Other leather products—saddlery, harness, trunks; finishing, tanning.
( ) Rubber tires and tubes.
( ) Other rubber goods—boots, shoes, hose, artificial rubber.

Manufacturing—(Con.)

( ) Bone, celluloid, and ivory products.
( ) Sawmill and planing mill products.
( ) Other wood products—carriages, wagons, furniture, baskets, etc.
( ) Paper, pulp and products.
( ) Printing, publishing, and allied industries.
( ) Petroleum and other mineral oil refining and products.
( ) Chemicals proper, acids, compounds, coal-tar products, etc.
( ) Allied chemical substances, drugs, oils, soaps, etc.

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—Nature of Business—(Continued) Page 3 of Return—Cont'd

Manufacturing—(Con.)

( ) Paints, pigments, varnishes, etc.
( ) Fertilizers.
( ) Stone, clay, glass, and related products.

Metal products and processes:

( ) Iron and steel—products of blast furnaces, rolling mills, foundries.
( ) Locomotives and railroad equipment.
( ) Motor vehicles, complete or parts.
( ) Machinery — factory, used in producing food, leather, metal, paper, printing, rubber, stone, clay, glass, textile and wood products.

Manufacturing—(Con.)

( ) Machinery — agricultural and equipment.
( ) Machinery — electrical and equipment.
( ) Machinery — other, building, construction, gas and mining machinery and equipment.
( ) Household equipment—metal furniture, refrigerators, sewing machines, washing machines, etc.
( ) Office equipment.
( ) Metal building material and equipment.
( ) Hardware, tools, etc.
( ) Precious metal products and processes.
( ) Other metals, products and processes.

Manufacturing—(Con.)

( ) Radios, complete or parts.
( ) Musical, professional, and scientific instruments; optical goods, small boats.
( ) Airplanes, airships, seaplanes; parts.
( ) Construction — excavations, bridges buildings, railroads, ships; equipping and installing systems.
( ) Transportation — rail, water, aerial, motor, etc.; leasing such facilities.
( ) Public utilities — electric light or power, gas (artificial or natural), pipe lines, telegraph, telephone, radio, water-works, heat supply, toll bridges, etc.; leasing such utilities.

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—Nature of Business—(Continued) Page 3 of Return—Cont'd

Manufacturing—(Cont'd)

( ) Storage—cold storage, grain elevators, warehouses, safe-deposit vaults, etc.

Trade:

( ) Wholesale.

( ) Retail.

( ) Wholesale and retail.

( ) Commission.

( ) All other trade — repair service, garages for storage, film exchange, etc.

Miscellaneous Mfg.—(Cont'd)

( ) Service—professional, business, amusement, domestic, and all other.

Finance:

( ) Banks—national, State, private, savings; joint-stock land banks.

( ) Stock and bond brokers, investment bankers or brokers, investment trusts.

Manufacturing—(Cont'd)

( ) Real estate, realty holding, real estate agents.

( ) Insurance companies (not agents).

(X) Other finance — loan companies, building and loan associations; note, mortgage or pawn brokers; stock syndicates, insurances agents

AFFILIATIONS WITH OTHER CORPORATIONS (See Instruction 39)

3. Is this a consolidated return?—No. If so, procure from the collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.

4. Was the income of this corporation included in a consolidated return for the prior year?—No.

If so, give name of corporation which filed the consolidated return. ....

....

Predecessor Business

5. Did the corporation file a return under the

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—Affiliations With Other Corporations—(Cont'd) Page 3—(Cont'd)

same name for the preceding taxable year?—Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917?—No. If answer is "yes", give name and address of each predecessor business, and the date of the change in entity.

....

....

....

Upon such change were any asset values increased or decreased? ....

If the answer is "yes", closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

6. Is this return made on the basis of cash receipts and disbursements?—Yes. If not, describe fully what other basis or method was used in computing net income. ....

....

Valuation of Inventories

7. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.

....

Preparation of Return (See Instruction 51)

8. Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation?—Yes. If so, give the name and ad-
(Answer "yes" or "no")

dress of such person or persons and state the nature and extent of the assistance or advice received and the items and schedules in respect of which the assistance or advice was received; if this return was actually prepared by any person or persons other than the corporation, state the source of the

Plaintiff's Exhibit No. 9—(Continued)

Schedule L—Preparation of Return—(Cont'd) Page 3 of Return—(Cont'd)

information reported in this return and the manner in which it was furnished to or obtained by such person or persons—Prepared from books after audit.

Information Return

9. Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 57) for the calendar year 1934?—Yes.
(Answer "yes" or "no")

List of Attached Schedules

10. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return—Schedule B. 25.

Page 4 of Return

SCHEDULE A (See Instructions 2 and 5)
[Followed by ruled form not filled in]

SCHEDULE B—CAPITAL GAINS AND LOSSES (See Instruction 10)
[Followed by ruled form not filled in]

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 15)
[Followed by ruled form not filled in]

SCHEDULE D—COST OF REPAIRS (See Instruction 17)
[Followed by ruled form not filled in]

Plaintiff's Exhibit No. 9—(Continued)

Page 4—(Cont'd)

SCHEDULE E—TAXES PAID (See Instruction 19)

1. Items	2. Amount (Enter as Item 19)
State Francise Tax	$ 114.90
Federal Capital Stock Tax	120.00
Federal Check Taxes	3.54
	$ 238.44

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. (See Instruction 20)

[Followed by ruled form not filled in]

SCHEDULE G—BAD DEBTS (See Instruction 21)

[Followed by ruled form not filled in]

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 12)

[Followed by ruled form not filled in]

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 23)

[Followed by ruled form not filled in]

Plaintiff's Exhibit No. 9—(Continued) Page 4—(Cont'd)

SCHEDULE J—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES
(See Instruction 11)
[Followed by ruled form not filled in]

AFFIDAVIT (See Instruction 50)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including its accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

[Corporate Seal] JOHN C. ALTMAN
(President ~~or other principal officer)~~ (State Title)

Sworn to and subscribed before me this 13th day of March, 1935.

[Notarial Seal] AGNES M. COLE,
(Signature of officer administering oath) (Title)

Notary Public, in and for the City and County of San Francisco, State of California.

[Illegible]
(Treasurer, ~~Assistant Treasurer or Chief Accounting Officer)~~ (State Title)

Plaintiff's Exhibit No. 9—(Continued)

AFFIDAVIT (See Instruction 51) Page 4—(Cont'd)

I/~~we~~ swear (or affirm) that I/~~we~~ prepared this return for the person named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/~~we~~ have any knowledge.

Sworn to and subscribed before me this 13th day of March, 1935.

[Notarial Seal] AGNES M. COLE
(Signature of officer administering oath) (Title)

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires October 18, 1938.

....
(Signature of Person preparing the return)

B. H. HICKLIN
(Signature of Person preparing the return)

HICKLIN and REDMOND,
C.P.A'S
(Name of firm or employer, if any)

Plaintiff's Exhibit No. 9—(Continued)

SANTA INEZ COMPANY

111 Sutter Street, San Francisco, California

FORM 1120 CALENDAR YEAR 1934

Taxpayer is a personal holding company within the meaning of Section 351 of the Revenue Act of 1934, and is therefore required to execute and file Form 1120-H. Taxpayer is unable to file Form 1120-H for the reason that the Collector of Internal Revenue for the First District of California (being the district within which taxpayer has its place of business) has no Forms 1120-H available and taxpayer has been unable to ascertain from any source the nature of the information required to be furnished upon Form 1120-H. No surtax is payable by taxpayer under the provisions of Section 351 of the Revenue Act of 1934.

Plaintiff's Exhibit No. 9—(Continued)

Santa Inez Company—111 Sutter Street—San Francisco—California
Form 1120—Calendar Year 1934

SCHEDULE B—CAPITAL GAINS AND LOSSES

	Bonds		Acq.	Received	Cost	Gain
12	M 165 Broadway, N. Y.	5½%	1932	$ 6,175.20	$ 7,080.00	$ 904.80
12.5	M Broadway & 20th Prop.	6	1933	3,025.00	3,158.00	133.00
200	M L. A. Ambassador Hotel	6	1932/33	65,607.50	53,366.54	12,240.96
24	M Sacramento Medico Dental Building	6½	1932	10,299.47	10,990.00	690.53
1	M Seventh & Hill Bldg.	6½	1932	1,000.00	515.00	485.00
				$86,107.17	$75,109.54	$10,997.63

SCHEDULE 25—OTHER EXPENSES

Traveling	$ 155.26	Trust Fees	420.61
Legal	2,876.20	Miscellaneous	113.72
Auditing	150.00		
			$3,715.79

[Printer's Note: In the column headed "Gain" the figures $904.80, 133.00 and 690.53 appear in bold face type.]

Plaintiff's Exhibit No. 9—(Continued)

Santa Inez Company

111 Sutter Street—San Francisco—California

Form 1120—Calendar Year 1934

STATEMENT REGARDING INVESTMENTS

Statement with respect to exchange of securities deemed to be a non-taxable exchange.

This corporation owned first mortgage bonds of the Whitney Estate Company and of the Sacramento Medico Dental Building Company during the year 1934. After acquisition of said bonds by this corporation the trustee of each property in due course sold the respective property at a foreclosure sale and each property was purchased by a Bondholders' Protective Committee.

As a result of the action of the Whitney Estate Company Bondholders' Committee this corporation received stock in a new corporation, 133 Geary Corporation, in the exact proportion that this corporation's bondholding was to the total bonds deposited with the Bondholders' Committee. Over 95% of the bonds of the Whitney Estate Company had been deposited and remained with the Bondholders' Protective Committee.

No gain or loss is included in this income tax return for the reason that this exchange of securities is believed to come within the provision of Section 112(g) of the Revenue Act of 1934.

The bonds of the Sacramento Medico Dental

Exhibit No. 9—(Continued)

Building Company owned by this corporation were dealt with in the same manner as above outlined except that during 1934 this corporation had not received the new securities proposed to be issued by a new corporation formed in 1934 for purpose of acquiring the properties of the old Sacramento Medico Dental Building Company. This delay was due to the preparation of an application preliminary to securing permission from the Corporation Commissioner of the State of California for the issuance of securities proposed under the new organization.

It is proposed to issue bonds and stocks of the new corporation to the bondholders represented by the Bondholders' Protective Committee in the exact proportion that said bondholders held bonds of the former corporation with the exception that 9½% of the bondholders of the former corporation who did not deposit their bonds with the Bondholders' Protective Committee shall not receive any securities of the new corporation.

Accordingly, it is believed that this transaction also comes within the reorganization provision of Section 112(g) of the Revenue Act of 1934 and that no gain or loss was realized from this exchange during 1934.

Plaintiff's Exhibit No. 9—(Continued)

[Stamped]: Computation proved AMENDED RETURN [In pencil]: 400488 Williams

Form 1094 Must Be Filed With This Return

CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

Form 1120
Treasury Department
Internal Revenue Service
(Auditor's Stamp)
Audited
Int. to 12/31/36
Tax Liability
Increased $15323.01*
Interest 1649.22*
Total $16972.23*
*[Circled in pencil]
Return Audited by
C. M. Williams
Agent ~~or Auditor~~
Division
Date Forwarded to
Collector Jan. 15 1937
Account No. 520039
Date of
Assessment 1937 Jan.

For Calendar Year 1934 or Fiscal Year
begun.................., 1934, and ended...................., 1935.
Print Plainly Corporation's Name and Business Address

SANTA INEZ COMPANY
(Name)

111 SUTTER STREET
(Street and Number)

SAN FRANCISCO CALIFORNIA
(Post Office and State)

It is Essential, Except Where Otherwise Provided in the Instructions, That This Form be Completely Filled in Irrespective of Any Statements, Schedules, or Reports Submitted Herewith.

Date of Incorporation—March 2, 1932.

Under the Laws of what State or County—California

[Stamped on left hand margin]: R.A.R. Attch. to 1935 Return.

[Printed on left hand margin]: Attach Remittance Here.

Page 1 of Return

File Code 1255

Serial Number 400700

[Stamped] Jan.
District 1-Calif.

(Cashier's Stamp)

Received
With Remittance

Dec 31 1935

Collector of Int. Rev.
First Dist. Calif.

Cash Check M.O.
Cert. of Ind.

First Payment
$13815.55

Amended Return

Plaintiff's Exhibit No. 9—(Continued)

Corporation Income and Excess-Profits Tax Return—(Con'td) Page 1—(Cont'd)

The Corporation's Books are in Care of.. Located at ....

[In pencil]: J T A 4/8/37 E-3

Kind of Business (in detail) Investments. Is This a Consolidated Return of Railroad Corporations? No.
(Also check industrial division on Page 3)

If so, of How Many Corporations?............ If a Foreign Corporation, State Whether Resident or Nonresident .... If Nonresident, State Amount of Income Excluded (Instruction 33) From Gross Income?................ Is the Corporation a personal holding company within the meaning of Section 351 of the Revenue Act of 1934? Yes. (If so, an additional return on Form 1120 H must be filed.)
(Answer "yes" or "no") See Original Return

[Pencilled across face of Gross Income]: J T A 3/19/37 E-3. [Stamp]: Illlegible.

Item and Instruction No.

GROSS INCOME

1. Gross Sales (where inventories are an income-determining factor), $................; Less Returns and Allowances, $.............., Net Sales $..................
2. Less Cost of Goods Sold:
   (a) Inventory at beginning of year..$..................
   (b) Material or merchandise bought for manufacture or sale.... ....
   (c) Miscellaneous costs (From Schedule A, Column 1):
      (1) Salaries and wages $........................; (2) Other costs, $........................; Total ....

Amended Return — **Plaintiff's Exhibit No. 9—(Continued)** — Page 1 Return—(Cont'd)

Gross Income—(Continued)

Item and Instruction No.			
	(d) Total of lines (a), (b), and (c)	$	
	(e) Less Inventory at end of year	$	
3.	Gross Profit from Sales (Item 1 minus Item 2)		$
4.	Gross Receipts (where Inventories are not an income-determining factor)	$	[Stamped]: 1613
5.	Less cost of operations (From Schedule A, Column 2): (a) Salaries and wages, $; (b) Other costs, $; Total		
6.	Gross Profit where Inventories are not an income-determining factor (Item 4 minus Item 5)		
7.	Interest on Loans, Notes, Mortgages, Bonds, Bank Deposits, etc.		4,716.37
8.	Rents		
9.	Royalties		
10.	Capital Gain or Loss (From Schedule B)		10,997.63
11.	Interest on Liberty Bonds, etc. (From Schedule J)		
12.	Dividends on Stock of:		
	(a) Domestic Corporations subject to taxation under Title I of Revenue Act of 1934		
	(b) Domestic Corporations not subject to taxation under Title I of Revenue Act of 1934		

Amended Return — Plaintiff's Exhibit No. 9—(Continued) — Page 1 Return—(Cont'd)

Gross Income—(Continued)

Item and Instruction No.			
	(c) Foreign Corporations	....	
13.	Other Income (State nature of income) (Use separate schedule, if necessary) Per schedule	72,463.28	
14.	Total Income in Items 3, and 6 to 13, inclusive		$ 88,177.28

DEDUCTIONS

[Stamped on face of Deductions]: Original Assessment Verified Tax $985.75 Penalty.......... Interest.......... Account #400488 - 1935 A J Pr W

15.	Compensation of Officers (From Schedule C)	$..........
16.	Rent on Business Property	....
17.	Repairs (From Schedule D): (a) Salaries and Wages, $..........; Total	....
18.	Interest	1,090.71
19.	Taxes (From Schedule E)	238.44
20.	Losses by Fire, Storm, etc. (From Schedule F)	....
21.	Bad Debts (From Schedule G)	....
22.	Dividends (Item 12 (a) above)	....
23.	Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	....
24.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 24)	....

Amended Return — Plaintiff's Exhibit No. 9—(Continued) — Page 1 Return—(Cont'd)

Deductions—(Continued)

Item and Instruction No.			
25.	Other Deductions Authorized by Law (Explain below, or on separate sheet):		
	(a) Salaries and wages. (Not included in Items 2, 5, 15, or 17 above)	3,500.00	
	(b) Other Expenses	3,715.79	
26.	Total Deductions in Items 15 to 25		8,544.94
27.	Net Income (Item 14 minus Item 26)		$ 79,632.34

COMPUTATION OF TAX

Income Tax

28.	Net income (Item 27, above)	$79,632.34
29.	Less Interest on Liberty Bonds, etc. (Item 11)	
30.	Balance subject to Income Tax (Item 28 minus Item 29)	$79,632.34
31.	Income Tax (13¾% of Item 30) (or 15¾% of Item 30, if this is a consolidated return of railroad corporations)	$10,949.45

Income Tax—(Continued)

32.	Less Income Tax Paid at Source. (This credit can be allowed only to a non-resident foreign corporation)	$	
33.	Income Tax Paid to a Foreign Country or U. S. Possession by a Domestic Corporation		
34.	Balance of Income Tax (Item 31 minus Items 32 and 33)		$10,949.45*

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Computation of Tax—(Continued) — Page 1 Return—(Cont'd)

Excess-Profits Tax

35. Net Income for Excess-profits Tax Computation (Item 27, above) $79,632.34
36. Less $12\frac{1}{2}\%$ of $120,999. value of capital stock as declared in your capital-stock tax return for year ended June 30, 1934 .... 15,124.88

37. Amount subject to Excess-profits Tax (Item 35 minus Item 36) $64,597.46

Excess-Profits Tax—(Continued)

38. Excess-profits Tax (5% of Item 36) 3,225.37*

[In pencil]: Int. paid 153.20*

Note—Separate computation of Excess-profits Tax must be made on Form 1120 by each member of an affiliated group of railroad corporations making a consolidated Income Tax return.

[In pencil]: 10949.45
985.75 Aug Assmt
Tax 9963.70*
Int. 473.28* Int. @ 6% Pd.

* Figures circled in pencil.

Plaintiff's Exhibit No. 9—(Continued)

Amended Return SCHEDULE K—BALANCE SHEETS (See Instruction 44) Page 2 of Return

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
ASSETS				
1. Cash		$ 8,051.23		$ 4,697.46
2. Notes receivable				2,500.00
3. Accounts receivable	$		$	
(a) Less reserve for bad debts		6,000.00		
4. Inventories:				
(a) Raw materials	$		$	
(b) Work in process				
(c) Finished goods				
(d) Supplies				
5. Investments (nontaxable):				
(a) Obligations of a State, Territory, or any political subdivision thereof, or District of Columbia, or United States possessions	$		$	

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule K—Balance Sheets—(Continued) — Page 2—(Cont'd)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
5. (Continued)				
(b) Obligations of instrumentalities of the United States				
(c) Obligations of the United States				
6. Other investments:				
(a) Stocks of domestic corporations	$ 75,599.92		$164,793.77	
(b) Bonds of domestic corporations	178,888.19		195,194.53	
(c) Stocks and bonds of foreign corporations				
(d) All other investments or loans		254,488.11		359,988.30
7. Deferred charges:				
(a) Prepaid insurance	$		$	
(b) Prepaid taxes				
(c) All other				
8. Capital assets:				
(a) Land	$		$	
(b) Buildings				

Plaintiff's Exhibit No. 9—(Continued)

Amended Return | Schedule K—Balance Sheets—(Continued) | Page 2—(Cont'd)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
(c) Machinery and equipment				
(d) Furniture and fixtures				
(e) Delivery equipment				
	$		$	
(f) Less reserves for depreciation (except on land)				
9. Patents				
10. Good will				
11. Other assets (describe fully):				
Deposit a/c purchase of securities	$			9,000.00
12. Total Assets		$268,539.34		$376,185.76

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule K—Balance Sheets—(Continued) — Page 2—(Cont'd)

LIABILITIES

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
13. Notes payable (less than one year)		$ 20,000.00		$ 60,000.00
14. Accounts payable		44,199.45		96,076.70
15. Bonds and notes (not secured by mortgage)				
16. Mortgages (including bonds and notes so secured)				
17. Accrued expenses:				
(a) Interest	$		$	
(b) Taxes				
(c) All other				
18. Other liabilities (describe fully):				
	$		$	
19. Capital stock:				
(a) Preferred stock (less stock in treasury)	$		$	
(b) Common stock (less stock in treasury)		100,000.00		100,000.00

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule K—Balance Sheets—(Continued) — Page 2—(Cont'd)

Items	Beginning of Taxable Year Amount	Beginning of Taxable Year Total	End of Taxable Year Amount	End of Taxable Year Total
20. Surplus Paid In	$100,000.00		$100,000.00	
21. Undivided profits	4,339.89	104,339.89	20,109.06	120,109.06
22. Total Liabilities		$268,539.34		$376,185.76

Remarks

SCHEDULE L—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

Page 3 of Return

1. Net income from Item 27, page 1 of the return $79,632.34
2. Nontaxable income:
   (a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia, or United States possessions ....

2. (Continued)
   (b) Interest on obligations of the United States (except interest in excess of exemption as reported in Schedule J (c)) ....
   (c) Dividends deductible under Section 23 (p) of the Revenue Act of 1934 ....

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule L—Reconciliation of Net Income—(Cont'd) — Page 3—(Cont'd)

2. (Continued)
   - (d) Proceeds of life insurance policies paid upon the death of the insured ....
   - (e) Other items of nontaxable income (to be detailed):
     - (1) ....
     - (2) ....
     - (3) ....
3. Charges against reserve for bad debts, if Item 21, page 1 of return, is not an addition to a reserve..........
4. Charges against reserves for contingencies, etc. (to be detailed):
   - (a) ....
   - (b) ....
   - (c) ....
5. Total of lines 1 to 4, inclusive..........$..........
6. Total from Line 14..........
7. Net profit or loss for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6 (if loss, indicate) $79,632.34
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year 4,339.89
9. Other credits to surplus (to be detailed):
   - (a) ....
   - (b) ....
   - (c) ....
10. Total of Lines 7 to 9, inclusive..........$83,972.23
11. Total from Line 17 .... 63,863.17
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11) $20,109.06

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule L—Reconciliation of Net Income—(Cont'd) — Page 3—(Cont'd)

13. Unallowable deductions:

(a) Donations, gratuities, and contributions .... $..............

(b) Income and profits taxes paid to the United States, and such taxes paid to its possessions or foreign countries if claimed as a credit in whole or in part in Item 33, page 1 of the return.... ....

(c) Federal taxes paid on tax-free covenant bonds ....

(d) Special improvement taxes tending to increase the value of the property assessed ....

(e) Furniture and fixtures, additions, or betterments treated as expenses on the books............ ....

(f) Replacements and renewals ....

(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary ....

(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation............ ....

(i) Additions to reserve for bad debts which are not included in Item 21, page 1 of return.......... ....

(j) Additions to reserve for contingencies, etc. (to be detailed):

(1)........................

(2)........................

(3)........................

(k) Other unallowable deductions (to be detailed):

(1)........................

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule L—Reconciliation of Net Income—(Cont'd) — Page 3—(Cont'd)

13. (k)—(Continued)
    (2) ....
    (3) ....

14. Total of Line 13 .... $..........

15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):
    (a) Date paid 12/26/34
        Character Cash $12,000.00

15. (Continued)
    (b) Date paid 12/26/34
        Character Credit 51,076.70
    (c) Date paid.......... Character.......... ....
    (d) Date paid.......... Character.......... ....

16. Other debts to surplus (to be detailed):
    (a) Federal Tax on 1933 Income.... 786.47
    (b) ....
    (c) ....

17. Total of Lines 15 and 16 .... $63,863.17

NET INCOME (OR DEFICIT) REPORTED IN RETURN FOR CALENDAR YEAR 1933 OR FISCAL YEAR 1934

1. Net income .... $5,719.76 (or deficit .... $..........)

NATURE OF BUSINESS

2. Check the block to indicate the industrial division in which the corporation's main income producing business falls:

[Printer's Note: Listings under this head are identical with the listings as set out on pages 187-189 of this printed record, and are not duplicated here for that reason.]

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Schedule L—(Continued) — Page 3—(Cont'd)

AFFILIATIONS WITH OTHER CORPORATIONS (See Instruction 39)

3. Is this a consolidated return?—No. If so, procure from the collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return.

4. Was the income of this corporation included in a consolidated return for the prior year?—No.

If so, give name of corporation which filed the consolidated return. ....

....

Predecessor Business

5. Did the corporation file a return under the same name for the preceding taxable year?—Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization, of a business or businesses in existence during this or any prior year since December 31, 1917?—No. If answer is "yes", give name and address of each predecessor business, and the date of the change in entity.

....

....

....

Upon such change were any asset values increased or decreased? ....

If the answer is "yes", closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

6. Is this return made on the basis of cash receipts and disbursements?—Yes. If not, describe fully what other basis or method was used in computing net income. ....

....

Valuation of Inventories

7. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and

Plaintiff's Exhibit No. 9—(Continued)

Amended Return | Schedule L—(Continued) | Page 3—(Cont'd)

the date inventory was last reconciled with stock.

....

Preparation of Return (See Instruction 51)

8. Did any person or persons advise the corporation in respect of any question or matter affecting any item or schedule of this return, or assist or advise the corporation in the preparation of this return, or actually prepare this return for the corporation?—Yes. If so, give the name and ad-
(Answer "yes" or "no")
dress of such person or persons and state the nature and extent of the assistance or advice received and the items and schedules in respect of which the assistance or advice was received; if this return was actually prepared by any person or persons other than the corporation, state the source of the information reported in this return and the manner in which it was furnished to or obtained by such person or persons—Prepared from books after audit.

Information Return

9. Did the corporation make a return of information on Forms 1096 and 1099 (see Instruction 57) for the calendar year 1934?—Yes.
(Answer "yes" or "no")

List of Attached Schedules

10. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return—Schedule 13.

Amended Return | SCHEDULE A (See Instructions 2 and 5) | Page 4 of Return

[Followed by ruled form not filled in]

Amended Return — Plaintiff's Exhibit No. 9—(Continued) — Page 4—(Cont'd)

SCHEDULE B—CAPITAL GAINS AND LOSSES (See Instruction 10)
[Followed by ruled form not filled in]

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 15)
[Followed by ruled form not filled in]

SCHEDULE D—COST OF REPAIRS (See Instruction 17)
[Followed by ruled form not filled in]

SCHEDULE E—TAXES PAID (See Instruction 19)

1. Items	2. Amount (Enter as Item 19)
State Francish Tax	$ 114.90
Federal Capital Stock Tax	120.00
Federal Check Taxes	3.54
	$ 238.44

SCHEDULE F—EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC.
(See Instruction 20)
[Followed by ruled form not filled in]

Amended Return Plaintiff's Exhibit No. 9—(Continued) Page 4—(Cont'd)

SCHEDULE G—BAD DEBTS (See Instruction 21)
[Followed by ruled form not filled in]

SCHEDULE H—INCOME FROM DIVIDENDS (See Instruction 12)
[Followed by ruled form not filled in]

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION
(See Instruction 23)
[Followed by ruled form not filled in]

SCHEDULE J—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES
(See Instruction 11)
[Followed by ruled form not filled in]

AFFIDAVIT (See Instruction 50)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including its accompanying schedules and statements, if any) has been examined by him and is, to the best of his knowledge and belief, a true, cor-

Plaintiff's Exhibit No. 9—(Continued)

Amended Return — Affidavit—(Continued) — Page 4—(Cont'd)

rect, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1934 and the Regulations issued thereunder.

Sworn to and subscribed before me this 28th day of December, 1935.

[Corporate Seal] JOHN C. ALTMAN
(President or other principal officer) (State Title)

[Notarial Seal] LOUIS WIENER
(Signature of officer administering oath) (Title)

ALLEN W. EDELMAN
(Treasurer, Assistant Treasurer, or chief accounting officer) (State Title)
Treasurer

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires July 30th, 193

AFFIDAVIT (See Instruction 51)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including its accompanying schedules and statements, if any) is a true, correct, and complete statement of all the information respecting the income tax and/or excess-profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Sworn to and subscribed before me this 28th day of December, 1935.

B. H. HICKLIN
(Signature of person preparing the return)

[Notarial Seal] LOUIS WIENER
(Signature of officer administering oath) (Title)

....
(Signature of person preparing the return)

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires July 30th, 193

....
(Name of firm, or employer, if any)

Plaintiff's Exhibit No. 9—(Continued)

SANTA INEZ COMPANY—111 SUTTER STREET—SAN FRANCISCO—CALIFORNIA
Form 1120—Calendar Year 1934—Amended
SCHEDULE 13—GAIN ON EXCHANGES OF PROPERTY

Bonds	Realized	Cost	Gain
Whitney Estate Company	$104,328.95 (a)	$59,421.25	$44,907.70
Sacramento Medico Dental Bldg. Co.	64,200.00 (b)	36,644.42	27,555.58
	$168,528.95	$96,065.67	$72,463.28

(a) On February 27, 1934, taxpayer owned $136,000.00 principal amount of first mortgage bonds of the Whitney Estate Company, deposited with a Bondholders Protective Committee. At a foreclosure sale on that date the Committee acquired, on behalf of all depositing bondholders, the property, which then had a fair market value of $855,344.00, as determined by independent appraisal. A total of $1,115,000.00 of bonds out of $1,175,000.00 bonds outstanding were deposited with the Committee, therefore taxpayer's pro-rata share of value realized is 136/1115 of $855,344.00, or $104,328.95.

(b) On October 30, 1934, taxpayer owned $85,600.00 principal amount of first mortgage bonds of the Sacramento Medico Dental Building, Inc. deposited with a Bondholders Protective Committee. At a foreclosure sale on that date the Committee acquired the property, which then had a fair market value of $300,000.00, as determined by independent appraisal. A total of $400,000.00 of bonds out of $416,500.00 bonds outstanding participated in the acquisition of the property by the Committee, therefore this corporation realized its pro rata of the value of the property, 856/4000 of $300,000.00 or $64,200.00.

Mr. Ellis: That is the case, your Honor.

Miss Phillips: Your Honor, the question is one of law. There is no question of fact, no factual question involved in this case. It is a question of interpreting the statute on tax-free exchanges, so I am not offering any evidence. I would like to have the record show a motion for judgment for the defendant on all the issues involved. I assume your Honor may want a memorandum of authorities filed.

Mr. Ellis: We can either brief it or argue it.

(After discussion, it was agreed that the matter should be submitted on briefs.)

[Endorsed]: Filed July 12, 1943.

[Endorsed]: No. 10499. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Santa Inez Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 22, 1943.

PAUL P. O'BRIEN,

Clerk of United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10499.

UNITED STATES OF AMERICA,

Appellant,

vs.

SANTA INEZ COMPANY, a corporation,

Appellee.

DESIGNATION OF POINTS TO BE RELIED ON IN THE APPEAL OF THE ABOVE ENTITLED CASE

The Appellant hereby designates the Points filed in the District Court and contained in the Record docketed in this Court as the Points designated and to be relied on in the appeal of the above entitled case.

FRANK J. HENNESSY,
United States Attorney
By W. E. LICKING,
Assistant United States Attorney.

DESIGNATION FOR PRINTING RECORD ON APPEAL

To the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

Appellant hereby designates all of the record on appeal as the record to be printed.

FRANK J. HENNESSY,
United States Attorney
By W. E. LICKING,
Assistant United States Attorney.

[Endorsed]: Filed Jul 22 1943. Paul P. O'Brien, Clerk.

No. 10551

United States
Circuit Court of Appeals
For the Ninth Circuit.

14

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

FILED
OCT 28 1943
PAUL P. O'BRIE
C

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10551

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

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Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Taxpayer:

GEORGE G. WITTER, ESQ.

For Comm'r.:

SAMUEL TAYLOR, ESQ.,
R. C. WHITLEY, ESQ. [1*]

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*Page numbering appearing at top of page of original certified Transcript of Record.

Before the United States Board of Tax Appeals

Docket No. 99144

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named Petitioner hereby appeals from the decision of the Commissioner of Internal Revenue set forth in the latter's ninety day deficiency letter dated March 14, 1939, and as a basis of his appeal sets forth the following:

I.

(a) The Petitioner is an individual residing at No. 4190 South Western Avenue, Los Angeles, California.

(b) The deficiency letter, a copy of which is attached hereto, marked "Exhibit A", was mailed to the Petitioner on March 14, 1939. Said letter stated a deficiency in income tax for the year 1934, in the amount of $545.36, and a deficiency for the year 1935 in the amount of $13,130.24, and asserted a penalty for each of said years amounting to fifty percent (50%) of the deficiencies.

(c) The amount in controversy in this appeal is additional taxes for the years 1934 and 1935, in the total amount of $13,675.60, and in addition thereto an [3] asserted penalty in the amount of $6,565.12.

II.

With respect to the deficiency asserted for the year 1934, the Petitioner assigns the following errors:

(a) The Commissioner erred in determining that the Petitioner realized any gain from certain Condemnation Proceedings, in which the Petitioner lost riparian and littoral water rights pertinent to certain lands owned by the Petitioner in Mono County, California.

(b) In determining a gain from said Condemnation Proceedings, the Commissioner wholly failed to consider the basic cost to the Petitioner of said water rights and further failed to include more than a fraction of the expenses incurred by the Petitioner in the Condemnation Proceedings.

(c) The Commissioner erred in holding that the Petitioner received any gross amount in 1934 by reason of a judgment since appeal from said judgment was filed and pending on and after December 31, 1934.

(d) The Commissioner erred in imposing any penalty.

III.

The facts upon which the Petitioner relies in respect to the year 1934 follow:

(a) In 1934 and for more than ten years prior thereto the Petitioner was the owner of certain lands in Mono County, together with the water rights, both riparian and littoral pertinent to said lands. Said lands and water [4] rights had been

acquired by the Petitioner at a cost to him of over $100,000.

(b) In 1930 the City of Los Angeles filed suits, seeking to condemn the water rights pertinent to the Petitioner's said lands. The Petitioner resisted said suits by employment of able counsel, the procurement of expert witnesses, and in every other legitimate way be could at an expense to him, amounting to over $65,000.

(c) In 1934 two judgments were entered in said suits, one for $68,000 in favor of the Petitioner as compensation for the riparian rights, and one for $20,000 in compensation for the littoral rights. The Petitioner filed appeals from both of said judgments.

(d) In 1934 the City of Los Angeles paid into Court the amount of the judgment given for riparian rights, namely $68,000. Of this sum the Court ordered $5,625.00 to be impounded pending determination of the title to certain portions of the land. The Petitioner's appeals from both judgments were pending at the close of the year 1934.

(e) In the year 1935 there was paid to the Petitioner a further sum of $61,000 on account of which and in consideration of which the Petitioner dismissed the two appeals that he had filed from the two judgments rendered, and assigned the $20,000 judgment, which of record was not satisfied, to the Sierra Light & Power Company, who ostensibly had paid to him the $61,000 [5]

(f) In filing his Return for the year 1934, the

Petitioner reflected thereon in gross income, the $68,000 which was paid into Court in that year in satisfaction of one judgment and took as a deduction on his Return $68,000 as damage sustained by him.

In filing his Return for the year 1935, the Petitioner reflected thereon as gross income an item of $55,000 and took as a deduction a similar amount as damage sustained by him to property.

Petitioner realized no gain whatsoever from said Condemnation Proceedings, either in the year 1934 or 1935. Petitioner had no intention at any time, or under any circumstances to defraud the United States from any revenues to which it was entitled.

IV.

With respect to the deficiency assessed for the year 1935 Petitioner assigns the following errors:

(a) The Commissioner erred in determining that the Petitioner derived any profit whatsoever from certain Condemnation Proceedings.

(b) In determining gain or loss from Condemnation Proceedings in 1935, the Commissioner erred in omitting the Petitioner's basic cost of the water rights condemned and in including only a portion of the expenses paid and incurred in the Condemnation Proceedings.

(c) The Commissioner erred in imposing any fraud penalty on the Petitioner. [6]

V.

The facts upon which the Petitioner relies with respect to the year 1935 are stated in Paragraph III

above and said paragraph is hereby referred to and by this reference incorporated in this Petition at this point.

Wherefore, the Petitioner prays that the Board hear and determine its appeal and enter an Order of No Deficiency.

GEORGE G. WITTER,
Attorney for Petitioner, Citizens National Bank Bldg.,
Los Angeles, Calif. [7]

State of California,
County of Los Angeles—ss.

J. B. Clover, being first duly sworn on oath deposes and says: That he is the Petitioner in the above appeal; that he has read the foregoing Petition and knows the contents thereof and that the statements contained therein are true to the best of his knowledge, information and belief.

J. B. CLOVER.

Subscribed and sworn to before me this 7th day of June, 1939.

[Seal] NETTIE BENTLEY,
Notary Public in and for said County and State.

My commission expires April 11, 1940. [8]

EXHIBIT "A"

Office of
Commissioner of Internal Revenue

Treasury Department
Washington

Mar 14, 1939.

Mr. J. B. Clover,
4190 South Western Avenue,
Los Angeles, California.

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1934 and 1935 discloses a deficiency of $13,675.60 and $6,565.12 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Respectfully,
GUY T. HELVERING,
Commissioner.

(Signed) By JOHN R. KIRK,
Deputy Commissioner.

Enclosure:
Statement. [9]

STATEMENT

IT:Aj
JC-33133-90D

Mr. J. B. Clover,
4190 South Western Avenue,
Los Angeles, California.

Tax Liability for Taxable Years Ended
December 31, 1934 and 1935

Income Tax

	Liability	Assessed	Deficiency	50% Penalty
1934	$ 545.36	None	$ 545.36	None
1935	13,130.24	None	13,130.24	$ 6,565.12
Totals	$13,675.60	None	$13,675.60	$ 6,565.12

This determination of your income tax liability has been made upon the basis of information on file in the Bureau.

The 50 percent penalty shown herein for the taxable years ended December 31, 1934 and 1935, has been asserted in accordance with the provisions of section 293 (b) of the Revenue Act of 1934.

Adjustment to Net Income
Taxable Year Ended December 31, 1934

Income as disclosed by return	$ 760.51
Unallowable deduction and additional income	
(a) Capital gain	10,205.18
Net income adjusted	$10,965.69

[10]

Explanation of Adjustment

(a) Adjustment is made to include taxable profit realized as the result of damages awarded upon

the condemnation of riparian rights appurtenant to certain land owned in Mono County, California. The results of this transaction were reflected in your return as a nontaxable transaction by reason of reporting income from this source in an amount of $68,000.00 and a corresponding loss allegedly sustained as damages to the property. Computation of the profit is set forth hereinafter.

Award of damages for riparian rights to 480 acres of land		$68,000.00
Less:		
Sum impounded by the Superior Court of Tuolumne County pending settlement of a question raised by the administrator for the estate of Louis Samaan who claimed an interest in this land............		5,625.00
Net amount received during 1934		$62,375.00
Less:		
Legal fees paid in connection with the condemnation proceedings	$26,735.32	
Value of water rights severed from land	1,622.40	28,357.72
Net profit from severance of water rights from the land......		$34,017.28

The water rights having been acquired May 28, 1918 were held over ten years. The profit indicated above is therefore subject to the capital gain limitation of 30 percent which produces a taxable profit of $10,205.18. [11]

Computation of Tax—1934

Net income as adjusted	$10,965.69
Less:	
Personal exemption ($107.91 allowed on wife's separate return)	2,392.09
Balance surtax net income	$ 8,573.60
Less:	
Earned income credit (minimum)	300.00
Balance subject to normal tax	$ 8,273.60
Normal tax at 4% on $8,273.60	$ 330.94
Surtax on $8,573.60	214.42
Correct income tax liability	$ 545.36
Income tax assessed	None
Deficiency of income tax	$ 545.36

Adjustments to Net Income
Taxable Year Ended December 31, 1935

Income as disclosed by return		$ 289.84
Unallowable deduction and additional income		
(a) Capital net gain	$61,000.00	
(b) Other income	1,000.00	62,000.00
Net income adjusted		$62,289.84

Explanation of Adjustments

(a) Adjustment is made to include profit from the assignment of an interest in a condemnation award made by a jury in October, 1934, for the littoral rights appurtenant to land owned in Mono County, California, as indicated below. [12]

This item was improperly reported on your return for the year as a nontaxable transaction by the incorrect designation as income from damage

to property by severance of water rights in an amount of $55,000.00, and the deduction of a corresponding amount designated by the same description.

The correct income from this source is set forth below.

Cash received from the Southern Sierras Power Company for the assignment of interest in a condemnation award against the City of Los Angeles, California	$ 66,625.00
Less:	
Attorney's fees paid during 1935 in connection with the assignment of the award	5,625.00
Capital net gain, 100% subject to tax	$ 61,000.00

(b) Income was also received in the amount indicated, represented by cash received from the Sierra Land and Water Company which had, in turn, been received from the Southern Sierra Power Company for any interest the Sierra Land and Water Company may have had in litigation involving Rush Creek water rights. This payment was received as a reimbursement for legal fees paid for the account of the Sierra Land and Water Company during 1934. All legal expenses paid during 1934 having been allowed herein as deductions for that year, this item represents income for the year 1935 in its entirety.

Computation of Tax—1935

Net income adjusted	$ 62,289.84
Less:	
Personal exemption	2,500.00
Balance surtax net income	$ 59,789.84

Less:	
Earned income credit (minimum)	300.00
Balance subject to normal tax	$ 59,489.84

[13]

Normal tax at 4% on $59,489.84	$ 2,379.59
Surtax on $59,789.84	10,750.65
Correct income tax liability	$ 13,130.24
Income tax assessed	None
Deficiency of income tax	$ 13,130.24
50% Penalty	$ 6,565.12

[Endorsed]: U.S.B.T.A. Filed June 9, 1939.

[14]

[Title of Board and Cause.]

MOTION TO AMEND PETITION

Comes now the Petitioner and respectfully asks leave to amend his Petition by adding thereto the following:

(To Paragraph IV of Petition:)

(d) The Commissioner erred in not applying a capital gain rate of Thirty Percent (30%) to the capital gain as determined by him for the year 1935.

(To Paragraph V of Petition:)

The $61,000.00, in its entirety, received by the Petitioner in the year 1935 was money received from the disposition of a capital asset, namely water rights which had been owned by the Petitioner for over ten years and any profit resulting therefrom was subject

to the capital gain limitation of Thirty Percent. (30%).

(Sgd) GEORGE G. WITTER,
453 So. Spring Street
Los Angeles, Calif.
Attorney for Petitioner.

[Endorsed]: U.S.B.T.A. Filed Feb 2, 1942. [15]

[Title of Board and Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits, denies and avers as follows:

I.

(a), (b) and (c). Admits the allegations contained in subparagraphs (a), (b) and (c) of paragraph I of the petition.

II.

(a) through (d). Denies the allegations of error contained in subparagraphs (a) through (d) of paragraph II of the petition.

III.

(a) Admits so much of subparagraph (a) of paragraph III of the petition as states that in 1934 the petitioner was the owner of certain lands in Mono

County, California, together with the water rights, both riparian and littoral, pertinent to said lands, but denies that the said lands and water rights cost the petitioner $100,000.00 or anywhere near such amount. [16]

(b) Admits that in or about the year 1930 the City of Los Angeles filed suits seeking condemnation of water rights pertinent to the petitioner's lands and that the petitioner resisted said suits, and for that purpose employed counsel, but denies that the defense of his interests cost him $65,000 or anywhere near that amount.

(c) through (f). Admits the allegations contained in subparagraphs (c) through (f) of paragraph III of the petition, except respondent denies that the petitioner realized no gain from said condemnation proceeds in 1934 or 1935, and denies that petitioner's Federal income tax returns were not intentionally false and fraudulent, and denies that petitioner did not intend to defraud the United States of revenues justly due the Government.

IV.

(a), (b) and (c). Denies the allegations of error set forth in subparagraphs (a), (b) and (c) of paragraph IV of the petition.

V.

In answer to paragraph V of the petition, the respondent makes the same admissions and denials as he did with reference to the allegations of the petition in paragraph III and as he made with reference

to allegations in the petition with reference to the year 1934 that are similar to the alleged facts pertinent to the year 1935.

VI.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied. [17]

For further answer to the petition, the respondent avers:

VII.

(a) That the petitioner filed a false and fraudulent Federal income tax return for the calendar year 1935, therein substantially and flagrantly understanding his gross income, net income and income tax liability for said year, all with the intent to evade the payment of taxes due and owing from him to the respondent.

(b) In his said 1935 return, the petitioner reported gross income in the amount of $55,501.75 and deductions therefrom in the amount of $55,211.91, net income in the amount of $289.84, and no tax liability thereon, whereas in truth and in fact the petitioner received and should have reported gross income in an amount not less than $62,501.75, was entitled to deductions in an amount not exceeding $211.91, and should have taken no more; should have reported net taxable income in an amount not less than than $62,289.84; and should have returned as his tax liability an amount not less than $13,130.24.

(c) By reason of the petitioner's said fradulent omissions and commissions in making return of his

1935 income, he became and is liable for the ad valorem penalty of 50% of the deficiency in income taxes due and owing from him for the year 1935, which penalty amounts to $6,565.12. [18]

VIII.

In support of the above set forth allegations of fraud taxes and penalty claimed to be due from the petitioner, the respondent states:

(a) In 1918, the petitioner and others promoted an irrigation project in the Mono basin, Mono County, California, in connection with which petitioner undertook to construct a ditch. Without cost to him, he acquired title to 480 acres of land situated on Rush Creek and the shore of Mono Lake. He also received a substantial portion of the capital stock of the Rush Creek Mutual Ditch Company as promotion stock, which stock he subsequently sold for approximately $100,000.00.

(b) The alleged objects and purposes of the Rush Creek Mutual Ditch Company were to secure water rights, construct a ditch, and irrigate the desert lands of its stockholders in Mono County, California. However, because of prior rights to the waters involved, the company was unsuccessful and it never was able to get title to any water. A portion of the proposed ditch was constructed but it was always dry and was never connected with Rush Creek or any other waters. Apparently the undertaking was merely a stock-selling scheme and an effort to secure a color of title to valuable water rights which had become the object of a struggle for their possession

between a group of affiliated power companies on the one hand and the farmers located in the district on the other. In 1921, the [19] United States Department of the Interior denied the companies' application for a right of way for the proposed irrigation ditch across Government land. At that time the companies' project was definitely determined to be not feasible and further work on the ditch was abandoned.

(c) Subsequently, the City of Los Angeles began to acquire lands and waters in the Mono basin for the purpose of exporting the waters to Los Angeles for municipal purposes. The City purchased outright such lands and water rights as it was able to acquire at reasonable prices and proceeded with condemnation proceedings aaginst such property as it could not so acquire.

(d) The said 480 acres of the petitioner became involved in the condemnation proceedings, petitioner contending for a value of $500,000.00. In 1934, the petitioner accepted $68,000.00 awarded for the riparian rights but declined to accept $20,000.00 awarded him for the littoral rights, and appealed from the award.

(e) Certain power companies had sold, under the provisions of an executory contract dated October 20, 1933, lands and waters to the City of Los Angeles, the consideration therefor to be paid to the associated companies as provisions of the contract were fulfilled. One of the provisions was that all litigation affecting the water rights involved must be settled

prior to the payment of the final escrow. That provision made it necessary that petitioner's appeal from the $20,000.00 award for his purported littoral rights be settled. As the amounts due the associated companies drew no interest, it became highly desirable [20] to them that the final escrow in the transaction be closed and that they get their money. Under the circumstances, petitioner's rights to the appeal from the $20,000.00 award for littoral rights were of substantial value to the associated companies far in excess of the water rights involved. In 1935, petitioner succeeded in selling his award and all rights and claims in the litigation relative thereto to the associated companies for $66,625.00 and made an assignment to the associated companies of his award and rights in the appeal from the award that was pending.

(f) For the year 1935, the petitioner reported but $55,000.00 of the $66,625.00 so received by him and claimed a deduction of $55,000.00 as damages to property by reason of severance of the water rights so as to show no profit or loss on the sale, although, as a matter of fact, the petitioner sustained no loss or damage on account of the sale, the amount so received being wholly gain and profit.

Wherefore, it is prayed that the appeal be denied and that the tax and penalty shown in the deficiency notice be in all respects approved.

(Signed) J. P. WENCHEL,
Chief Counsel, FTH
Bureau of Internal Revenue.

Of Counsel:
Alva C. Baird,
Frank T. Horner,
B. M. Coon,
Special Attorneys.
Bureau of Internal Revenue.
BMC/w 7/21/39

[Endorsed]: U.S.B.T.A. Filed July 31, 1939. [21]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes Now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition of the above-named taxpayer, denies as follows:

(To Paragraph IV of Petition:)

(d) Denies the allegations of error contained in subdivision (d) of paragraph IV of the petition, as amended by the amendment to the petition.

(To Paragraph V of Petition:)

Denies the allegations of paragraph V of the petition, as amended by the amendment to the petition.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL,
Chief Counsel, FTH
Bureau of Internal Revenue.

Of Counsel:
Alva C. Baird,
Division Counsel.
Frank T. Horner,
Samuel Taylor,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed April 25, 1942.
[22]

The Tax Court of the United States

Docket No. 99144

J. B. CLOVER,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

GEORGE G. WITTER, ESQ.

For the petitioner,

SAMUEL TAYLOR, ESQ.,

For the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

The Commissioner determined an income tax deficiency of $545.36 for 1934 and an income tax deficiency of $13,130.24 and a penalty of $6,565.12 for 1935. Petitioner assails the determination of gain in the condemnation of water rights.

FINDINGS OF FACT

Petitioner, a construction engineer, is a resident of Los Angeles, California, and filed his income tax returns for 1934 and 1935 in the Sixth District of California.

In 1918, he entered into a contract with the Mono Valley Improvement Company to complete within three years the construction of a thirty-mile canal in Mono Basin. This project had been started about

1912 for the irrigation of desert land, and the Mono Valley Improvement Company had previously agreed to construct the canal for the Rush Creek Mutual Ditch Company. In consideration for petitioner's promise to do this work, the Mono Valley Improvement Company agreed to transfer to him 20,000 shares of Rush Creek Mutual Ditch Company, grading and camp equipment, promissory notes for a face amount of $56,730.25 payable to the Mono Valley Improvement Company and secured by 4,000 shares of Rush Creek Mutual Ditch Company, a deed to 480 acres and a contract of purchase for 428 acres in Mono County, and all outstanding shares of the Sierra Land and Water Company. During 1918, petitioner received 18,169 shares of Rush Creek Mutual Ditch Company; the promissory notes, then in default; a deed to the 480 acres, which had riparian rights on Rush Creek and littoral rights on Mono Lake; and the 1,000 outstanding shares of Sierra Land and Water Company. At the time of receipt, the fair market value of the riparian rights in the 480 acres was $2,957; that of the littoral rights was nil. Petitioner in years before 1929 realized $28,445 in sales of some of the Rush Creek Mutual Ditch Company shares, collected $710.33 on the promisory notes, and in 1936 sold the 480 acres, without riparian or littoral rights, for $3,500. He realized nothing from the Sierra Land and Water Company shares and did not receive the other consideration mentioned in the contract. The Mono Valley Improvement Company ceased business in 1920.

During the years 1919-1935, petitioner was engaged in construction of the canal and also of lateral feeder ditches, not required by his contract. Some of the feeder ditches crossed his 480 acres which he used as headquarters for the construction work and, to some extent, for pasture. He kept no books of account for the work, but has checks and loose memoranda showing disbursements. The total cost to petitioner of the construction work was $57,108.70. He filed no income tax returns for any of the years 1918 to 1933, inclusive.

Prior to 1930, the city of Los Angeles entered upon a large project for the use of the waters of Mono Basin. Water rights were in some instances acquired [23] by contract and in others by condemnation. In 1933, the city contracted to purchase from Nev-Cal Securities Company and other corporations their land holdings and water rights in the Basin. The contract provided inter alia that $2,230,000 of the purchase price be paid in escrow and held until awards for condemned properties should be fixed. It provided further that $100,000 of such awards be borne by the city and any excess by the sellers; special provisions covered several contingencies. On June 23, 1934, a judgment condemning the water rights of petitioner and others was entered in the city's favor. By it petitioner was awarded $68,000 as compensation for his riparian rights in the 480 acres and $20,000 as compensation for his littoral rights. Of the $68,000 award, petitioner received $62,375

in 1934 and $5,625 in 1935, the latter having been impounded pending settlement of an adverse claim.

On November 21, 1934, petitioner filed notice of appeal from that part of the judgment awarding him $20,000 for the littoral rights. On May 28, 1935, while the appeal was pending, petitioner sold and assigned all his right, title and interest in the $20,000 award to Nev-Cal Securities Company, stipulating and agreeing that the assignee might prosecute any appeal or other proceeding in its own name. Petitioner made this assignment "for and in consideration of the sum of Twenty Thousand Dollars ($20,000.00) to him in hand paid, by Nev-Cal." On the same date, he received from Nev-Cal $41,000 "as consideration for the dismissal of appeal and waiver of right to appeal" by him. Petitioner filed a dismissal of the appeal and also a release and discharge of the city, the Department of Water and Power of the city, and the water and power commissioners from all liability growing out of the condemnation of his interest, "for and in consideration of the payment into court of the sum of Twenty Thousand Dollars ($20,000.00) in satisfaction of judgment and the sum of Two Hundred Seventy-seven and 50/100 Dollars ($277.50) costs * * *, and in consideration of the payment to [him] of an additional sum of Twelve Thousand Dollars ($12,000.00) by the Department of Water and Power of the City of Los Angeles."

As expenses of the condemnation proceedings, petitioner paid $28,948.40 in 1934 and $5,625 in 1935. Before, during and after the condemnation pro-

ceedings, petitioner occupied a leased office equipped with a telephone. He used the office and telephone during the period of the proceedings. In 1934, he paid $240 for office rent and $175.95 for telephone service. On his income tax returns filed for 1934 and 1935, petitioner stated that his books were kept on a cash basis. For 1934, he reported gross income of $68,000 "from City of Los Angeles account damage to property" and deducted a like amount as damage to property. For 1935, he reported $55,000 "Damage to property by severance of water rights" and deducted a like amount as damage. He claimed no loss from performance of a long-term contract.

OPINION

Sternhagen, Judge: The petitioner filed no return for any year between 1917 and 1934. On his 1934 separate return, the total gross income shown was $69,640, on which one item was $68,000, "from City of Los Angeles account damage to property"; and the total deductions were $68,879.49, of which one item was $68,000, described as "damage to property by City of Los Angeles." The personal exemption of $1,250 more than offset the net income of $760.51 and no tax was shown. The Commissioner determined a deficiency amounting to $545.36, by finding an adjusted net income of $10,965.69, computed as follows: [24]

(a) Adjustment is made to include taxable profit realized as the result of damages awarded

upon the condemnation of riparian rights appurtenant to certain land owned in Mono County, California. The results of this transaction were reflected in your return as a non-taxable transaction by reason of reporting income from this source in an amount of $68,000.00 and a corresponding loss allegedly sustained as damages to the property. Computation of the profit is set forth hereinafter.

Award of damages for riparian rights to 480 acres of land		$ 68,000.00
Less:		
Sum impounded by the Superior Court of Tuolumne County pending settlement of a question raised by the administrator for the estate of Louis Samaan who claimed an interest in this land		5,625.00
Net amount received during 1934		$ 62,375.00
Less:		
Legal fees paid in connection with the condemnation proceedings	$ 26,735.32	
Value of water rights severed from land	1,622.40	28,357.72
Net profit from severance of water rights from the land		$ 34,017.28

The water rights having been acquired May 28, 1918 were held over ten years. The profit indicated above is therefore subject to the capital gain limitation of 30 per cent which produces a taxable profit of $10,205.18.

In the petition, petitioner assigns as error (1) the determination that gain was realized from condemnation proceedings in which he lost riparian and

littoral rights pertinent to the Mono County property, (2) the failure in determining gain, to consider "basic cost" of the water rights and to include expense incurred in the condemnation proceedings, and (3) the alleged holding that petitioner received any gross amount in 1934 by reason of a judgment since appeal from that judgment was filed and pending on and after December 31, 1934.

On his 1935 joint return, the total gross income shown was $55,501.75 of which one item was $55,000, called "damage to property by severance of water rights;" and the total deductions were $55,211.91, of which one item was $55,000, called "damage to property by severance of water rights." The personal exemption of $2,500 more than offset the net income of $289.84 and no tax was shown. A deficiency was determined amounting to $13,130.24 upon an adjusted net income of $62,289.84, computed as follows:

> (a) Adjustment is made to include profit from the assignment of an interest in a condemnation award made by a jury in October, 1934, for the littoral rights appurtenant to land owned in Mono County, California, as indicated below. [25]
>
> This item was improperly reported on your return for the year as a nontaxable transaction by the incorrect designation as income from damage to property by severance of water rights in an amount of $55,000.00, and the deduction of a corresponding amount designated by the same description.

The correct income from this source is set forth below.

Cash received from the Southern Sierras Power Company for the assignment of interest in a condemnation award against the City of Los Angeles, California	$ 66,625.00
Less:	
Attorney's fees paid during 1935 in connection with the assignment of the award	5,625.00
Capital net gain, 100% subject to tax	$ 61,000.00

The assigned errors in the determination are (1) that petitioner derived any profit whatever from condemnation proceedings, and (2) the omission of basic cost of condemned water rights and the inclusion of only part of expenses of the condemnation proceedings. By an amendment filed at the hearing, an additional error was assigned in the failure to apply a capital gain rate of 30 per cent to the gain determined for 1935.

At the opening of the trial, respondent expressly "withdrew the fraud issue" and no evidence as to fraud was introduced. The issue is, therefore, out of the case, and no penalty addition to the deficiency may be assessed for either year.

Much of the time and testimony of the trial was devoted to proof of detailed construction costs during the years 1919-1935, all of which was disputed by respondent and all of which was objected to both generally and specifically. After the trial, counsel at the Court's suggestion, agreed upon a summation of this evidence, and a finding has been

made that the total cost of the construction work of the main and lateral feeder ditches was $57,-108.70. This finding, however, has no usefulness in the view we take of the case.

We must preface the discussion by saying that the contentions are not clearly defined and have not been uniformly or consistently maintained or clearly expounded. Petitioner received condemnation awards of $68,000 for the riparian rights and $20,000 for the littoral rights appurtenant to the 480 acres on Mono Lake which had been received in 1918 in consideration for his promise to do the construction job. The question is as to the gain from these awards, and the ordinary approach is to compare the amount received with the cost of the property condemned and treat the difference as gain or loss. This would seem to have nothing to do with the cost of petitioner's performance of a contract for construction on other property. But petitioner argues as if all of his cost of constructing the main and lateral ditches, whether on his own property or on property of others, is involved in ascertaining his gain or loss. The nature and design of petitioner's venture are not easily understood and therefore afford no help in considering a correct theory upon which to determine his income. In 1918, he had received the consideration for his promise to construct the canal in three years. The Mono Valley Improvement Company with which the contract was made has apparently long since gone out of existence. Petitioner had sold some of

the shares of the Rush Creek corporation, and respondent suggests that petitioner's venture was to derive a profit from the sale of shares. This petitioner resents, but offers no other explanation. If that were the fact, it can only be said that some of the Rush [26] Creek shares and the Sierra Land shares are still owned by him and are not the subject of gain or loss in the condemnation award from the water rights on the 480 acres.

Although petitioner in his pleading and at the trial suggested that he was contesting the determination that taxable gain was realized in 1934, he makes no such contention in his brief, but confines his argument to an attack on minor details of the computation. Specifically he seeks to increase the condemnation expenses relying on evidence of additional payments, and he seeks also to increase the basis for gain in the award for riparian rights. Upon the evidence we have found (as conceded by respondent) $28,948.40 as the amount of expenses paid by petitioner in 1934 in connection with the condemnation proceedings and $2,957 as the value of the riparian rights at the time of petitioner's acquisition. Since these two figures are larger than those used in determining the deficiency, the taxable gain for 1934 should be recomputed accordingly. The contention that amounts paid for rent and telephone are proper expenses of the condemnation proceedings incurred and paid in 1934 is rejected. The office and telephone were maintained by petitioner, regularly before, during, and after the condemnation proceedings. They were, therefore,

ordinary and necessary expenses of his regular business rather than expenses specifically connected with the condemnation, and are deductible from gross income and not a factor of capital net gain.

As to 1935, the $66,625 received as a result of the condemnation proceedings is taxable as capital gain. This the petitioner does not contest. The amount is not in dispute and the deduction of $5,625, paid as attorney's fees in that year, is regarded by each party as proper. Petitioner contends, however, that only 30 per cent of the resulting net gain of $61,000 is taxable, and not the entire 100 per cent, as respondent has determined. Since $5,625 of the gross proceeds represented an impounded portion of the $68,000 award, it was obviously in payment for riparian rights held over 10 years and is, as was the portion received in 1934, subject to the 30 per cent limitation. In his brief respondent concedes that the $20,000 received expressly for petitioner's assignment of his interest in the judgment award for littoral rights constituted proceeds from the disposition of a capital asset held over 10 years and that gain on it is taxable only to the extent of 30 per cent, and we so hold.

The $41,000 received by petitioner in 1935 was not received from the city, which acquired his rights, but from Nev-Cal Securities Company. The payment was expressly described as consideration for the dismissal of the appeal. Relying on this characterization, respondent now argues that it is taxable as ordinary income. Petitioner insists that it was received as consideration for his water rights;

that the mere "mechanics of payment" are immaterial, and that it should serve as a factor in the computation of capital gain realized in 1935, being in reality consideration for the disposition of littoral rights.

The character of the $41,000 payment appears in its declared purpose. The $20,000 was the compensation for littoral rights; the $41,000 was the consideration for dismissal of the appeal. The two were separate and their different characters may not be ignored for tax purposes; MacDonald v. Commissioner, 76 Fed. (2d) 513; Marshall C. Allaben, 35 B. T. A. 327. "The choice of disregarding a deliberately chosen arrangement" is not available to the taxpayer. Gray v. Powell, 314 U. S. 402. There is no lack of substance in the characterization of the $41,000 as consideration for dismissal of the appeal. Prosecution of the appeal would have delayed settlement for very valuable water rights which the city was acquiring from Nev-Cal Securities Company and other power companies [27] and the amount of condemnation awards to others was to be a factor in determining the amount which Nev-Cal would receive from the city for its own lands and water rights. Hence, Nev-Cal had a substantial economic stake in the speedy settlement of condemnation awards and in keeping them down to a minimum. These economic benefits were a reason for Nev-Cal's payment of the amount and give it its character. As consideration received for petitioner's forbearance to exercise a legal right, it is ordinary income.

A substantial part of the evidence was given to establish costs incurred during the years 1919-1935, in carrying out the contract with the Mono Valley Improvement Company to construct a thirty-mile canal in Mono Basin. During the trial, petitioner's counsel contended, over respondent's objection, that evidence of these costs was relevant to establish basis for gain or loss in the condemnation award for the riparian rights and the littoral rights appurtenant to the 480 acres. In his brief petitioner does not suggest that such costs should serve to increase the basis for the water rights condemned, but uses them instead as a factor in the computation of a claimed "loss from construction costs in the year 1935, when he abandoned further work." He computes the loss by subtracting from the total cost the amounts which he collected in earlier years on the notes and proceeds from the sale of Rush Creek Company shares and the later sale of the 480 acres without water rights,—in short, the amount realized from the disposition of all the items received in 1918 as consideration for his promise to construct the canal, leaving out the awards for the condemned water rights. Such a claim is first asserted in petitioner's original brief and is not covered by any assignment of the petition.

In his reply brief, he asserts a claim to the use of the completed contract basis in computing the income resulting from the performance of the construction work. He keeps no books and prior to 1934 he filed no income tax returns. His returns for 1934 and 1935 were prepared on the cash basis.

In the absence of a well-adopted accounting method on the completed contract basis, he may not accumulate expenses of earlier years for deduction in the later year. He never adopted the completed contract basis and has failed to establish any foundation for the use of that basis now. He has maintained no accounting system, a necessary prerequisite for its use, Dan Birkemeier, 39 B. T. A. 1072, and his tax returns for 1934 and 1935 make no reference to the choice of such a basis, Articles 42-4, Regulations 86; cf. Hageman-Harris Co. v. United States, 87 Ct. Cl. 296; 23 Fed. Supp. 450, even if such a choice could be held to survive the fourteen years for which no returns were filed. It seems doubtful indeed that the proven costs are all related to the contract of 1918 which was to be completed in three years and made no reference to feeder ditches. No loss deduction is allowable.

Decision will be entered under Rule 50.

Entered: December 10, 1942. [28]

The Tax Court of the United States
Washington

Docket No. 99144

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

In accordance with the Court's Memorandum Findings of Fact and Opinion, entered December 10, 1942, the respondent filed a computation of the deficiencies which came on for hearing on February 17, 1943. No objections having been filed, it is

Decided that there is a deficiency in income tax of $406.40 for 1934, and a deficiency in income tax of $8,382.85 and no penalty for 1935.

[Seal] J. W. STERNHAGEN,
Judge. [29]

Entered February 18, 1943.

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 99144

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

To the Honorable the Judges of the United States Circuit Court of Appeals of the Ninth Circuit:

J. B. Clover, an individual residing in the City of Los Angeles, California, in support of his Petition filed in pursuance of the provisions of Section 1001 of the Revenue Act of 1926, for the review of the decision of the Tax Court of the United States rendered on February 18, 1943, finding a deficiency in income tax of $8,382.85 for the calendar year of 1935, respectfully shows this Honorable Court as follows:

I.

Statement of the Nature of the Controversy

In 1918 the Petitioner acquired 480 acres of land in Mono County, California, together with the water rights appurtenant thereto. In or about the year of 1920, the City of Los Angeles began acquisition of water rights in Mono County by purchase and by condemnation. It instituted suit in the Superior

Court of California to condemn the Petitioner's water rights. In this suit judgment was entered in June, 1934, awarding the Petitioner $68,000.00 for his riparian rights and $20,000.00 for his littoral rights. In November, 1934, Petitioner took an appeal from that portion of [30] the judgment awarding him $20,000.00 for littoral rights. In May, 1935, while the appeal was still pending, a settlement was effected of the litigation then pending, under the terms of which settlement the Petitioner received the sum of $61,000.00. In making said settlement the Petitioner assigned all his right, title and interest in the $20,000.00 award to the Nev-Cal Securities Company "for and in consideration of $20,000.00 to him in hand paid by Nev-Cal." On the same date he received from Nev-Cal Securities Company $41,000.00 "as consideration of dismissal of appeal and waiver of right appeal" by him.

Nev-Cal Securities Company had an agreement with the City for sale of its own lands and as part of said agreement had contracted to pay all awards made in condemnation suits in excess of a total of $100,000.00.

In rendering this decision the Tax Court held that the $20,000.00 received by the Petitioner in the settlement represented capital gain from sale of an asset held more than ten years, and therefore, taxable (under the Revenue Act applicable 1934) only to the extent of 30% thereof. It held that the $41,000.00 was consideration received by the Petitioner from forbearance to exercise a legal right and was ordinary income taxable in full.

The Petitioner contended before the Tax Court and now contends that the entire $61,000.00 received by him in the settlement was consideration received from the enforced sale of a capital asset held by him more than 10 years, and therefore, capital gain subject to tax to the extent of 30% thereof only.

II.

Designation of Court of Review

The Petitioner being aggrieved by the said decision of the Tax Court of the United States and having at all times had his residence in the City of Los Angeles, State of California, and having filed his income tax return for the calendar year 1935 [31] with the Collector of Internal Revenue of the Sixth District of California, desires a review of said decision by the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, your Petitioner prays that this Honorable Court may review said decision and modify the same in accordance with the Petitioner's contentions.

J. B. CLOVER,
Petitioner.
GEORGE G. WITTER,
Attorney for Petitioner.

[Endorsed]: T.C.U.S. Filed May 8, 1943. [32]

The Tax Court of the United States
Washington

Docket No. 99144

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 35, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 27th day of August, 1943.

(Seal) B. D. GAMBLE,

Clerk, The Tax Court of the United States.

[Endorsed]: No. 10551. United States Circuit Court of Appeals for the Ninth Circuit. J. B. Clover, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed September 14, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 10551

J. B. CLOVER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S DESIGNATION OF POINTS ON WHICH HE RELIES AND PORTIONS OF RECORD DEEMED NECESSARY ON APPEAL

1. The Findings of Fact do not support the Conclusions of Law or Final Order of The Tax Court.

2. The Tax Court erred in holding that any portion of the $61000.00 received by Petitioner in set-

tlement of condemnation suit was ordinary income and not capital gain from involuntary sale of a capital asset.

3. The Tax Court disregarded substance for form.

Portions of record designated by Petitioner:

1. Petition.
2. Amended Petition.
3. Answers.
4. Findings of Fact and Opinion of Tax Court.
5. Respondent's Proposed Recomputation filed January 16, 1943.
6. Final Order of Tax Court.

GEORGE G. WITTER,
Attorney for Petitioner
453 South Spring Street,
Los Angeles, California.

[Endorsed]: Filed Sept. 28, 1943. Paul P. O'Brien, Clerk.

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No. 10551

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. CLOVER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR APPELLANT.

Statement of Pleadings and Jurisdiction.

The Commissioner of Internal Revenue issued to the petitioner a letter dated March 14, 1939, alleging a deficiency in income tax for the calendar years 1934 and 1935, and allowing the petitioner ninety days within which to appeal to the United States Board of Tax Appeals.

Within ninety days from March 14, 1939, the petitioner filed its appeal with the United States Board of Tax Appeals. The respondent duly filed his answer thereto.

The appeal was heard before Hon. John M. Sternhagen, a member of the Board of Tax Appeals, sitting at Los Angeles, California, in February, 1942. On December 10, 1942, the Board handed down its findings of

fact and opinion, and on February 18, 1943, entered its final order.

On May 8, 1943, the petitioner filed with the Clerk of the Tax Court of the United States his petition for review by the United States Circuit Court of Appeals (Ninth Circuit), and served a copy thereof and a praecipe upon counsel for the respondent. Appeal is taken as to the taxable year 1935 only.

Statement of the Case.

The only question is whether the entire proceeds ($61,000.00) paid to the petitioner in 1935 in settlement of condemnation proceedings was capital gain from an involuntary sale of his water rights, as contended by the petitioner, or whether only $20,000.00 of such proceeds was such capital gain and the remaining $41,000.00 was ordinary income realized from "forbearance to exercise a legal right," namely, his right to prosecute his appeal to a conclusion, as contended by the respondent.

The pertinent facts are as follows:

Petitioner had owned land and water rights in Mono Basin, California, since 1918. In 1931 the City of Los Angeles started proceedings in the Superior Court to condemn these water rights. In 1934 judgment was entered awarding the City the water and awarding petitioner $68,000.00 for his riparian rights and $20,000.00 for littoral rights. The petitioner accepted payment of the award for riparian rights but filed notice of appeal from that portion of the judgment awarding him $20,000.00 for littoral rights. In May, 1935, while this appeal was still pending, a settlement of such appeal was

effected whereby petitioner received in 1935 $61,000.00 cash. The petitioner contends that this entire $61,000.00 was consideration realized from the enforced sale of his water rights and, therefore, capital gain, taxable only to the extent of 30%, having been held by petitioner for more than ten years. Respondent contends that only $20,000.00 is such capital gain and that the balance, amounting to $41,000.00, is ordinary income realized from "forbearance to exercise a legal right," namely, the right of petitioner to prosecute his appeal to a conclusion, and is, therefore, taxable in full.

The following facts pertain to the method and manner of settlement of the appeal and are so vital in this hearing that we quote the findings made by the Tax Court.

> "Prior to 1930, the city of Los Angeles entered upon a large project for the use of the waters of Mono Basin. Water rights were in some instances acquired by contract and in others by condemnation. In 1933, the city contracted to purchase from Nev-Cal Securities Company and other corporations their land holdings and water rights in the Basin. The contract provided *inter alia* that $2,230,000 of the purchase price be paid in escrow and held until awards for condemned properties should be fixed. It provided further that $100,000 of such awards be borne by the city and any excess by the sellers; special provisions covered several contingencies. On June 23, 1934, a judgment condemning the water rights of petitioner and others was entered in the city's favor. * * *
>
> "On November 21, 1934, petitioner filed notice of appeal from that part of the judgment awarding him $20,000 for the littoral rights. On May 28, 1935,

while the appeal was pending, petitioner sold and assigned all his right, title and interest in the $20,000 award to Nev-Cal Securities Company, stipulating and agreeing that the assignee might prosecute any appeal or other proceeding in its own name. Petitioner made this assignment 'for and in consideration of the sum of Twenty Thousand Dollars ($20,000.00) to him in hand paid, by Nev-Cal.' On the same date, he received from Nev-Cal $41,000 'as consideration for the dismissal of appeal and waiver of right to appeal by him. Petitioner filed a dismissal of the appeal and also a release and discharge of the city, the Department of Water and Power of the city, and the water and power commissioners from all liability growing out of the condemnation of his interest,' for and in consideration of the payment into court of the sum of Twenty Thousand Dollars ($20,000.00) in satisfaction of judgment and the sum of Two Hundred Seventy-seven and 50/100 Dollars ($277.50) costs * * *, and in consideration of the payment to (him) of an additional sum of Twelve Thousand Dollars ($12,000.00) by the Department of Water and Power of the City of Los Angeles." [Transcript of the Record pp. 23-24.]

To make the issue clearer we set out below the portion of the opinion of the Tax Court treating of the issue raised in this review.

"The $41,000 received by petitioner in 1935 was not received from the city, which acquired his rights, but from Nev-Cal Securities Company. The payment was expressly described as consideration for the dismissal of the appeal. Relying on this characterization, respondent now argues that it is taxable as ordinary income. Petitioner insists that it was re-

ceived as consideration for his water rights; that the mere 'mechanics of payment' are immaterial, and that it should serve as a factor in the computation of capital gain realized in 1935, being in reality consideration for the disposition of littoral rights.

"The character of the $41,000 payment appears in its declared purpose. The $20,000 was the compensation for littoral rights; the $41,000 was the consideration for dismissal of the appeal. The two were separate and their different characters may not be ignored for tax purposes; *MacDonald v. Commissioner,* 76 Fed. (2d) 513; *Marshall C. Allaben,* 35 B. T. A. 327. 'The choice of disregarding a deliberately chosen arrangement' is not available to the taxpayer. *Gray v. Powell,* 314 U. S. 402. There is no lack of substance in the characterization of the $41,000 as consideration for dismissal of the appeal. Prosecution of the appeal would have delayed settlement for very valuable water rights which the city was acquiring from Nev-Cal Securities Company and other power companies and the amount of condemnation awards to others was to be a factor in determining the amount which Nev-Cal would receive from the city for its own lands and water rights. Hence, Nev-Cal had a substantial economic stake in the speedy settlement of condemnation awards and in keeping them down to a minimum. These economic benefits were a reason for Nev-Cal's payment of the amount and give it its character. As consideration received for Petitioner's forbearance to exercise a legal right, it is ordinary income." [Transcript of the Record pp. 31-32.]

Points Relied Upon by Petitioner.

1. The Findings of Fact do not support the Conclusions of Law or Final Order of the Tax Court.

2. The Tax Court erred in holding that any portion of the $61,000.00 received by petitioner in settlement of the condemnation suit was ordinary income and not capital gain from involuntary sale of a capital asset.

3. The Tax Court disregarded substance for form.

Statutes Involved.

Section 117 (a). Federal Revenue Act of 1934:

> "(a) General Rule.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> 100 per centum if the capital asset has been held for not more than 1 year;
>
> 80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;
>
> 60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;
>
> 40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;
>
> 30 per centum if the capital asset has been held for more than 10 years."

Summary of Argument.

Net proceeds realized from the involuntary sale of a capital asset are capital gain entitled to the benefit of the Capital Gains Section of the Revenue Laws. The entire $61,000.00 was proceeds realized from the involuntary sale of petitioner's water rights. In holding that $41,000.00 was for mere dismissal of appeal and not for water rights the Board has plainly disregarded substance for form. The settlement employed the ordinary forms used in litigation, consisting of assignment and satisfaction of judgment, dismissal of appeal, and release of all parties from further liability. There is no point in the fact that the Nev-Cal Securities Co. entered the transaction. Nev-Cal Securities Co. was in privity with the City and payment by that Company was the same as payment by the City. Following form the Board has construed as two transactions what in substance was only one. The Board, purporting to follow the forms executed by the parties, has necessarily failed to do so because the forms themselves are conflicting. The Board has completely ignored one form. There was no substance in the petitioner's appeal, except as it related to the subject matter of the litigation, that is, the water rights themselves. The amount paid on settlement of the appeal is determinative, not the amount of the award in the court below. If ulterior motives are in the mind of the buyer this does not, as the Board states, characterize the taxable transaction for the seller.

ARGUMENT.

I.

Net Proceeds From the Involuntary Sale of an Asset Are Capital Gain.

The subject is well covered in the decision of this Honorable Court in *Hawaiian Gas Products, Ltd. v. Commissioner,* 126 F. (2d) 4. In that case a loss had occurred and the taxpayer was contending that the eminent domain proceeding did not constitute a sale governed by Section 117 (b) of the Revenue Act of 1936. But the Court, after referring to the decisions of the Supreme Court in *Helvering v. Hamill,* 311 U. S. 504, *Electro-Chemical Engraving Co. v. Commissioner,* 311 U. S. 513, dealing with mortgage foreclosures, and *Iowa v. McFarland,* 110 U. S. 471, 478, defining "sale," held that the transaction was a sale within the capital gain provisions and limited the taxpayer to a $2,000.00 loss. In that case the Court quoted with approval the following definition:

> "A proceeding to condemn is, in substance, a proceeding to compel a sale by the owner to the petitioner * * *."

In other cases the courts have gone further in holding that even interest included in a condemnation award on account of lapse of time is also to be treated as capital gain. *Seaside Improvement Co. v. Commissioner,* 105 F. (2d) 990 (C. C. A. 2); *Commissioner v. Estate of Edgar S. Appleby, et al.,* 123 F. (2d) 700 (C. C. A. 2).

In the instant case the Commissioner of Internal Revenue in the ninety day letter sent to the taxpayer designated the entire $61,000.00 "*Capital* net gain, 100% sub-

ject to tax." (Italics added.) [Tr. p. 11.] Also the Tax Court stated in its opinion [Tr. p. 31] as follows:

> "As to 1935, the $66,625.00 received as a result of the condemnation proceeding is taxable as *capital* gain." (Italics added.)

Later in the opinion [Tr. p. 32] the Board stated as follows:

> "As consideration received for petitioner's forbearance to exercise a legal right, it is ordinary income."

It is petitioner's position that there was one transaction, not two; that the entire amount realized was capital gain from the enforced sale of his water rights and from no other source and, therefore, taxable only to the extent of 30%, under the provisions of Section 117 *(supra).*

II.

In Arriving at Its Decision the Board Has Disregarded Substance for Form.

The cases cited above make it clear that net proceeds realized from involuntary sale of a capital asset are capital gain. That much is not disputed. But the Tax Court says that because the parties in settling the litigation drew one form in which the judgment in court below was assigned for its amount, to-wit: $20,000.00, and another form executed (on the same day) in which the appeal was to be dismissed for an added $41,000.00, that there are two transactions to be construed, one resulting in capital gain wherein the asset was sold, the other resulting in ordinary income wherein petitioner surrendered his right to prosecute his appeal to a conclusion. By so

treating the transaction, we think the Board has reversed the established rule and let substance give way to form.

No principle is more clearly established in the decisions of the courts than that in matters of taxation substance, not form, will control. *Lynch v. Turrish,* 247 U. S. 221; *So. Pacific Co. v. Lowe,* 247 U. S. 330; *Gulf Oil Corp. v. Lewellyn,* 248 U. S. 71; *U. S. v. Phellis,* 257 U. S. 156; *Weiss v. Stearn,* 265 U. S. 242; *Tex-Penn Oil Co. v. Commissioner of Internal Revenue,* 83 F. (2d) 518 (C. C. A. 3); *Commissioner of Internal Revenue v. Schumacher Wall Board Corp.,* 93 F. (2d) 79 (C. C. A. 9); *First Seattle Dexter Horton Nat. Bank v. Commissioner of Internal Revenue,* 77 F. (2d) 45 (C. C. A. 9).

Any attorney who is a practical lawyer is acquainted with the ordinary procedure employed in settling litigation. A figure of settlement is agreed upon, which is the primary consideration, and then the lawyers draw the necessary forms to effectually dispose of the matter. The plaintiff is principally interested in the cash. The defendant, in addition to the cash, is interested in seeing that the litigation is ended and that he is protected from future claims.

In this case an assignment and satisfaction of judgment was made, a dismissal of the appeal was filed, and a discharge and release from further liability was executed. Those were just ordinary steps taken in settling litigation where there is a money judgment below.

If the judgment had been for "nothing" below, mere dismissal of the appeal would have been sufficient. Would the Board then have held that no part of the $61,000.00 was for the asset condemned? Consistent with its an-

nounced principle it would have done so for the parties would have stipulated that $61,000.00 was paid "as consideration for the dismissal of appeal."

Nothing could be more erroneous than to treat the $20,000.00 awarded in the court below as a measure of value of water rights. As long as the appeal is pending there was no finality in that judgment. The litigation was as unterminated as if the case had not been tried. The appeal was as much a part of the determination of what petitioner should receive for his water rights as trial in court below. The suit was still going on. The final payment made for dismissal of the appeal is the significant and determining thing, not the award below. Naturally, as a matter of form the added consideration, $41,000.00, given in settlement was stated to be for dismissal of the appeal—and not in satisfaction of a $20,000.00 judgment.

The Board emphasizes that Nev-Cal Securities Co. paid the money, not the City. There is no point in this. That Company was in privity with the City. It had agreed to pay all awards over $100,000.00. [Tr. p. 23.] Payment by it was the same as payment by the City.

Also the Board suggests that Nev-Cal Securities Company had its own situation in mind and this induced it to make the settlement. Well, suppose it did, and suppose that situation had nothing to do with the value of petitioner's water rights, it still would not characterize the transaction for this petitioner, as the Board states. This petitioner was the seller and he is the taxpayer. Obviously, ulterior motives in the mind of a buyer would not alter the tax status of a seller. But the Board states "Nev-Cal. had a substantial economic stake in the speedy

settlement of condemnation awards and in keeping them down to a minimum." [Tr. p. 32.] This would surely indicate that Nev-Cal was fearful of paying more if the appeal were prosecuted to a conclusion and final value determined in court. If so, how can it be said that the money paid in settlement was not for water rights?

The difficulty in following forms is well illustrated in this case.

After saying that the parties must be held to the forms they executed the Board fails to do so in the following instances:

1. The document executed by the parties and filed with the Court recited that the $20,000.00 was being paid "into court" but the Board finds it was paid "in hand" to the petitioner. [Tr. p. 24.]

2. The form filed with the Court recites that $12,000.00 is paid by Department of Water and Power but the Board finds that the entire $61,000.00 is paid by Nev-Cal. [Tr. p. 24.]

3. The Board finds that judgment was assigned to Nev-Cal but it is the petitioner who executes the satisfaction of judgment. [Tr. p. 24.]

4. The Board finds that $41,000.00 was paid for dismissal of the appeal but form filed with the Court recites that $32,000.00 is being paid for dismissal of the appeal and several other things. [Tr. p. 24.]

Again observe the lack of consistency in the forms executed: When the petitioner assigned his judgment he stipulated that assignee might prosecute any appeal in its own name. *On the same date* he agreed to dismiss the appeal himself. [Tr. p. 24.] The judgment was then over eleven months old. [Tr. pp. 23-24.]

Perhaps the above illustrates one basic reason for disregarding form in favor of substance. There may be conflicting forms but there can be only one substance. Often the Courts have been confronted with forms indicating two or more transactions which for taxation, following the rule of substance, they have determined to be one transaction. The following extract from *Paul and Mertens Law of Federal Income Taxation,* Vol. 2, Sec. 17.112 (4), is to the point:

> "(4) The fact that two contracts are drawn to effectuate the purpose of the parties cannot convert one transaction into two separate and distinct transactions. *Comm. v. Moore,* 48 F. (2d) 526 (C. C. A. 10th, 1931), cert. den., 284 U. S. 620, 76 L. Ed. 528, 52 S. Ct. 8 (1932); *Comm. v. Garber,* 50 F. (2d) 588 (C. C. A. 9th Cir., 1931), petition dismissed 55 F. (2d) 1076 (C. C. A. 10th, 1931); *O'Meara v. Comm.,* 24 F. (2d) 390 (C. C. A. 10th, 1929)."
>
> *First Seattle Dexter Horton National Bank v. Commissioner of Internal Revenue,* 77 F. (2d) 45.

But the cases above cited differ, in our opinion, from the instant case in that each of the contracts in those cases had some substance, whereas here we see no substance in the dismissal of the appeal separate and apart from the subject matter to which the appeal related.

The right to sue in the courts and appeal to protect property from unlawful taking may or may not be an inherent right in property itself but it is so clearly allied to the property that it is difficult to say it has existence as a thing separate and apart from the property. At least there must be a cause of action. As one of the laws of the land designed to protect property the right to sue and

appeal with respect thereto would seem to be one of the rights in the "bundle of rights" that constitute the property itself and enhance its value. In this sense then if form be followed, as the Board has attempted to do, disposition was made of a property right in dismissing the appeal and Commissioner correctly designated the gain "net capital gain" in the ninety-day letter. But he was in error in saying "100% subject to tax" since even this right to sue was acquired with the property and owned over ten years.

But it should not be necessary to resort to any such fiction where the transaction is plain as here. What was said by the Court in *Industrial Cotton Mills Co. v. Commissioner*, 61 F. (2d) 291, is peculiarly applicable:

> "We think that the decision of the Board sacrifices substance to form. * * * It is a settled principle that 'courts will not permit themselves to be blinded or deceived by mere form of law but, regardless of fictions, will deal with the substance of the transaction involved.' * * *
>
> "The rule just stated is of peculiar importance in tax cases; for, unless the courts are very careful to regard substance and not form in matters of taxation, there is grave danger on the one hand that the provisions of the tax laws will be evaded through technicalities and on the other that they will work unreasonable and unnecessary hardship on the taxpayer. It is instructive to note the many tax cases decided in recent years in which the courts have not hesitated to ignore corporate forms, and to decide

the questions involved in the light of what the parties have actually done, rather than on the basis of forms in which they have clothed their transaction." (Citing cases.)

Equally pertinent is the language of this Honorable Court in its opinion in *First Seattle Dexter Horton National Bank v. Commissioner of Internal Revenue,* 77 F. (2d) 45, where it spoke as follows:

"Moreover, in view of the principle that, in applying income tax laws, the substance, and not the form, of the transaction should control, the exchange and sale of stock which was required under the whole contract herein should be treated as a single composite transaction for income tax purposes, regardless of the formalities followed. (Citing cases.) * * *

"If a taxpayer sought to avoid a tax on the profits of such a sale as this by asking the Commissioner to ignore the actualities, he would shortly and properly be reminded that taxation is an intensely practical matter and that the substance of the thing done, and not the form it took, must govern."

Apropos of what is suggested in the last paragraph above, suppose this petitioner had sustained a loss and were here contending he should be allowed to deduct the full amount thereof as an ordinary loss, on the ground that what he sold was not his water rights but merely his right to appeal. I think in that case both the petitioner and his counsel would "shortly and properly be reminded that taxation is an intensely practical matter and that the

substance of the thing done, and not the form it took, must govern."

The most frequent case of settlement of litigation is dismissal of suit before trial for a consideration. Does this mean that nothing has been realized from the cause of action but that all is derived from "forbearance to exercise a legal right," namely, the right to prosecute the suit to final judgment? We think not.

Respectfully submitted,

GEORGE G. WITTER,

Attorney for Appellant.

No. 10551

In the United States Circuit Court of Appeals for the Ninth Circuit

J. B. CLOVER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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Assistant Attorney General.
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FILED
JAN 1? 1944
PAUL P. O'BRIEN,
CLE[illegible]

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10551

J. B. Clover, petitioner

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 21–34) is unreported.

JURISDICTION

This petition for review (R. 36–38) involves federal income tax for the year 1935. On March 14, 1939, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiencies for the years 1934 and 1935, in the total amount of $13,675.60 plus a penalty of $6,565.12 for the year 1935. (R. 7–12.) Within ninety days thereafter the taxpayer filed a petition with the Board of Tax Appeals [1] for a redetermination of those deficiencies under the provisions of Sec-

[1] Now the Tax Court of the United States.

tion 272 of the Internal Revenue Code. (R. 2–6.) The decision of the Tax Court sustaining the deficiencies was entered February 18, 1943, and deficiencies determined in the amounts of $406.40 for 1934 and $8,382.85 for 1935. (R. 35.) (The claim for the penalty of $6,565.12 for the year 1935 was expressly withdrawn at the opening of the trial. (R. 28.)) Petition for review of the Tax Court's decision as to the year 1935 was filed May 8, 1943 (R. 36–38), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

The taxpayer received a condemnation award of $20,000 from the City of Los Angeles for his littoral rights. This was admittedly capital gain from an involuntary sale of property. Taxpayer also received $41,000 from Nev-Cal Securities Company "as consideration for the dismissal of appeal and waiver of right to appeal" from the judgment entered. Is the $41,000 also capital gain from the involuntary sale of taxpayer's littoral rights within the meaning of Section 117 of the Revenue Act of 1934, as contended by the taxpayer, or is it ordinary income realized from "forbearance to exercise a legal right," as contended by the Commissioner?

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 22. Gross income.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from

salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

(b) *Definition of Capital Assets.*—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or

not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

*　*　*　*　*

STATEMENT

This appeal involves an income tax deficiency for the year 1935 only. The facts pertinent to the taxpayer's receipt of $61,000 in that year may be summarized as follows (R. 21–39):

Taxpayer, a construction engineer, is a resident of Los Angeles, California, and filed his income tax return in the Sixth District of California. (R. 21.)

In 1918 the taxpayer acquired 480 acres of land in Mono Basin, California, which had riparian rights on Rush Creek and littoral rights on Mono Lake. The value of the littoral rights was nil. (R. 22.)

Prior to 1930 the City of Los Angeles entered upon a large project for the use of the waters of Mono Basin. Water rights were in some instances acquired by contract and in others by condemnation. In 1933 the city contracted to purchase from Nev-Cal Securities Company and other corporations their land holdings and water rights in the Basin. The contract provided *inter alia* that $2,230,000 of the purchase price be paid in escrow and held until awards for condemned properties should be fixed. It provided

further that $100,000 of such awards be borne by the city and any excess by the sellers. (R. 23.)

On June 23, 1934, a judgment condemning the water rights of the taxpayer and others was entered in the city's favor. The taxpayer was awarded $68,000 [2] as compensation for his riparian rights in the 480 acres and $20,000 as compensation for his littoral rights. (R. 23.)

On November 21, 1934, the taxpayer filed notice of appeal from that part of the judgment awarding him $20,000 for the littoral rights. On May 28, 1935, and while the appeal was pending, the taxpayer sold and assigned all his right, title and interest in the $20,000 award to Nev-Cal Securities Company, stipulating and agreeing that the assignee might prosecute any appeal or other proceeding in its own name. The taxpayer made this assignment (R. 24)—

> for and in consideration of the payment into court of the sum of Twenty Thousand Dollars ($20,000.00) in satisfaction of judgment and the sum of Two Hundred Seventy-seven and 50/100 Dollars ($277.50) costs * * *, and in consideration of the payment to [him] of an additional sum of Twelve Thousand Dollars ($12,000.00) by the Department of Water and Power of the City of Los Angeles.

On his 1935 joint return taxpayer reported as income an item of $55,000 called "damage to property by severance of water rights." He also took a deduction of $55,000 for an item entitled the same. (R. 27.)

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[2] The taxpayer accepted payment of the award of $68,000 as compensation for his riparian rights, $62,375 being received in 1934 and the remaining $5,625 being received in 1935. (R. 23–24.)

In his notice, showing a deficiency of $13,130.24, the Commissioner asserted the correct income from this source as follows (R. 11):

Cash received from the Southern Sierras Power Company for the assignment of interest in a condemnation award against the City of Los Angeles, California	[1] $66, 625. 00
Less:	
Attorney's fees paid during 1935 in connection with the assignment of the award	5, 625. 00
Capital net gain, 100% subject to tax	61, 000. 00

[1] This figure is comprised of the $5,625 received for the riparian rights in 1935; the $20,000 award for the littoral rights which taxpayer assigned; and the $41,000 received as consideration for dismissal of the appeal.

Although having designated the entire $61,000 as capital gain in the deficiency letter, upon trial before the Tax Court and in his brief the Commissioner contended that $41,000 of this amount was ordinary income and not subject to the 30 percent capital gain rate. (R. 31.)

The Tax Court sustained the Commissioner's contention and held (R. 31) that the $20,000 received for taxpayer's assignment of his interest in the judgment award for littoral rights constituted proceeds from the disposition of a capital asset held over ten years and was therefore taxable only to the extent of 30 percent. It also held (R. 32) that the $41,000 was received in consideration for the taxpayer's dismissal of the appeal of the littoral award and was ordinary income.

SUMMARY OF ARGUMENT

By virtue of a judgment condemning his littoral rights the taxpayer was awarded $20,000. When the judgment was entered a legal right to contest the

amount of the award vested in the taxpayer. Instead of exercising his right and possibly obtaining an increase in the award, the taxpayer chose to accept an offer of $41,000 in return for dismissing his appeal from the award made. This offer was not in settlement of the award for it was made by an outsider not a party to the condemnation proceedings. By dismissing his appeal the taxpayer thereby accepted the award of $20,000 and was paid that amount. This award of $20,000 is recognized to be a gain from the sale of a capital asset. However, the waiver of his legal right and dismissal of the appeal was not the sale of a capital asset. No property was conveyed to anyone. The $41,000 which taxpayer received for his forbearance to contest the award was ordinary income and not a capital gain.

ARGUMENT

In consideration for his forbearance to appeal a judgment award the taxpayer received ordinary income in the amount of $41,000 taxable under Section 22 (a) of the Revenue Act of 1934

The Tax Court found (R. 24) that the taxpayer sold and assigned all his right, title, and interest in the $20,000 award for littoral rights to Nev-Cal Securities Company "for and in consideration of the sum of Twenty Thousand Dollars ($20,000.00) to him in hand paid, by Nev-Cal," and that the taxpayer also received $41,000 from Nev-Cal "as consideration for the dismissal of appeal and waiver of right to appeal" by the taxpayer.

The Tax Court further held that the two were separate and that their different characters were not to be ignored for tax purposes. (R. 32.)

The taxpayer attacks the decision on the grounds that the above sums were received in one transaction and that the $41,000, as well as the $20,000, received from Nev-Cal was from the sale of his water rights. We submit that there were two transactions involved and that the above mentioned sums were received for two entirely different things.

In 1935 the taxpayer owned an award of $20,000 for his water rights. Nev-Cal had an agreement (R. 23) with the City of Los Angeles under which it was to pay all "awards" in excess of $100,000.[3] Nev-Cal paid the taxpayer's award according to its agreement. This admittedly amounted to a sale of a capital asset. *Hawaiian Gas Products* v. *Commissioner,* 126 F. 2d 4 (C. C. A. 9th). Since the taxpayer had held his water rights for more than ten years only 30 per cent of the gain received is to be taken into account in computing his net income. Section 117 (a) of the Revenue Act of 1934, *supra.* Therefore, the only question involved is whether the $41,000 received by taxpayer was also in payment for his water rights as contended by the taxpayer or was in payment for the taxpayer's dismissal of his appeal and taxable as ordinary income under Section 22 (a) of the Revenue Act of 1934, *supra,* as contended by the Commissioner.

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[3] Presumably, although the record does not disclose the fact, the awards made were in excess of $100,000 at the time the taxpayer received his judgment.

The taxpayer's assertion (Br. 9) that the Tax Court disregarded substance for form is not borne out by the facts. On the contrary the Tax Court found that the forms employed by the taxpayer, under which he received two separate payments, accurately presented the real and factual substance of the transactions. The record upon the hearing was voluminous. Apparently the taxpayer did not deem it necessary or expedient that the record upon this appeal contain either of the instruments from which the Tax Court made the above findings. It is well established that if the evidence in the record before this Court is not shown to be complete as to the issue before the Court, there is no basis for determining that a finding of fact by the lower court was not supported by substantial evidence and the finding must be accepted. *Helvering* v. *Ward*, 79 F. 2d 381, 383 (C. C. A. 8th), and cases cited therein.

The taxpayer seems to suggest (Br. 11) that the Tax Court's inquiry into Nev-Cal's reason for payment of the $41,000 (R. 32) was an attempt to change his own tax status. There is no foundation for this suggestion. Since the parties to that transaction were the taxpayer and Nev-Cal, it was certainly permissible for the Tax Court to inquire into Nev-Cal's conception of what it was purchasing in determining the true character and substance of the transactions.

Obviously, there are many cases holding that two separate contracts do not convert what is in reality one transaction into two separate and distinct transactions, or that one contract may embody two separate

transactions. *Helvering* v. *Ward, supra.* Here two forms were employed and it was found that they accurately represented two separate transactions. The taxpayer chose to accept the $20,000 award and to sell his right to litigate for an increase of that amount. It is only natural to suppose that he may have considered his chances upon appeal to be of less value than the offer made him by Nev-Cal. But whatever his reasons may have been, he disposed of his legal right without exercising it. The fact that a third party induced him to do so by a payment of money has no effect upon the award actually given him for his water rights. As stated by the Tax Court (R. 32): " 'The choice of disregarding a deliberately chosen arrangement' is not available to the taxpayer" (citing *Gray* v. *Powell,* 314 U. S. 402).

Even if it could be said that there was but one transaction involved, the fact remains that the taxpayer sold two entirely different things. One he sold to the city and the other he sold to Nev-Cal. The taxpayer asserts (Br. 11) that Nev-Cal was in privity with the city and that the payment of $41,000 by the latter was the same as payment by the city. The facts are to the contrary. Nev-Cal was in privity with the city only as to an agreed portion of amounts awarded for water rights. There is certainly no evidence that Nev-Cal was under any obligation to the city to pay more than an actual fixed award. The private arrangement between the taxpayer and Nev-Cal, whereby Nev-Cal offered the taxpayer $41,000 in consideration for the dismissal

of his appeal, is on an entirely different footing. Nev-Cal was merely bargaining for the cessation of the taxpayer's litigation for the reason that it was compelled to await disposition of that litigation before it could obtain payment of $2,230,000 for its own land holdings and water rights. (R. 23.) In this it was not in privity with the city.

Nev-Cal was not a party to the condemnation proceedings. It did not acquire the taxpayer's water rights. Under no theory can it be said that the condemnation proceedings constituted a sale to Nev-Cal. Regardless of whether Nev-Cal was motivated solely by a desire for a speedy settlement of the condemnation award, or by a fear that the award might be increased or by a combination of both motives, the fact remains that Nev-Cal purchased the taxpayer's forbearance to exercise a legal right. That legal right was no part of the award for taxpayer's water rights. Forbearance to exercise this right is analogous to forbearance to compete in a trade or business. In *Beals' Estate* v. *Commissioner,* 82 F. 2d 268, 270 (C. C. A. 2d), it is said:

> A promise not to work for others or for oneself is no more a conveyance of property than is a promise to enter the promisee's employ. Payment for either promise is income, not proceeds received on disposal of a capital asset.

See also *Ehrlich* v. *Higgins* (S. D. N. Y.), decided September 27, 1943 (1943 C. C. H., par. 9608); *Salvage* v. *Commissioner,* 76 F. 2d 112, 113, affirmed, 297 U. S. 106.

The taxpayer refers (Br. 8) to cases wherein it has been held that "interest" included in condemnation awards on account of lapse of time is also to be treated as capital gain. The Supreme Court held in *Kiesel-bach* v. *Commissioner,* 317 U. S. 399, that those decisions were in error. The Supreme Court said (p. 403):

> It [interest] is income under § 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under § 117.

It seems to us there was more substance in the contention that interest paid on an award should be treated the same as the award itself than in the contention made by this taxpayer.

The taxpayer also seems to contend (Br. 13–14) that his right to appeal was a capital asset which had been held for more than ten years. Even if we accept *arguendo* his contention that it was a capital asset, it did not come into existence until June 23, 1934, when the judgment condemning the water rights was entered. (R. 23.) Taxpayer dismissed his appeal on May 28, 1935. So it is clear that his right to appeal was held less than one year and if it were a capital asset 100 per cent of the $41,000 received should be taken into account under Section 117 (a), *supra.*

CONCLUSION

We submit that the decision of the Tax Court correctly held that the taxpayer received an ordinary gain of $41,000 which is taxable in full under Section 22 (a) of the Revenue Act of 1934.

Respectfully submitted.

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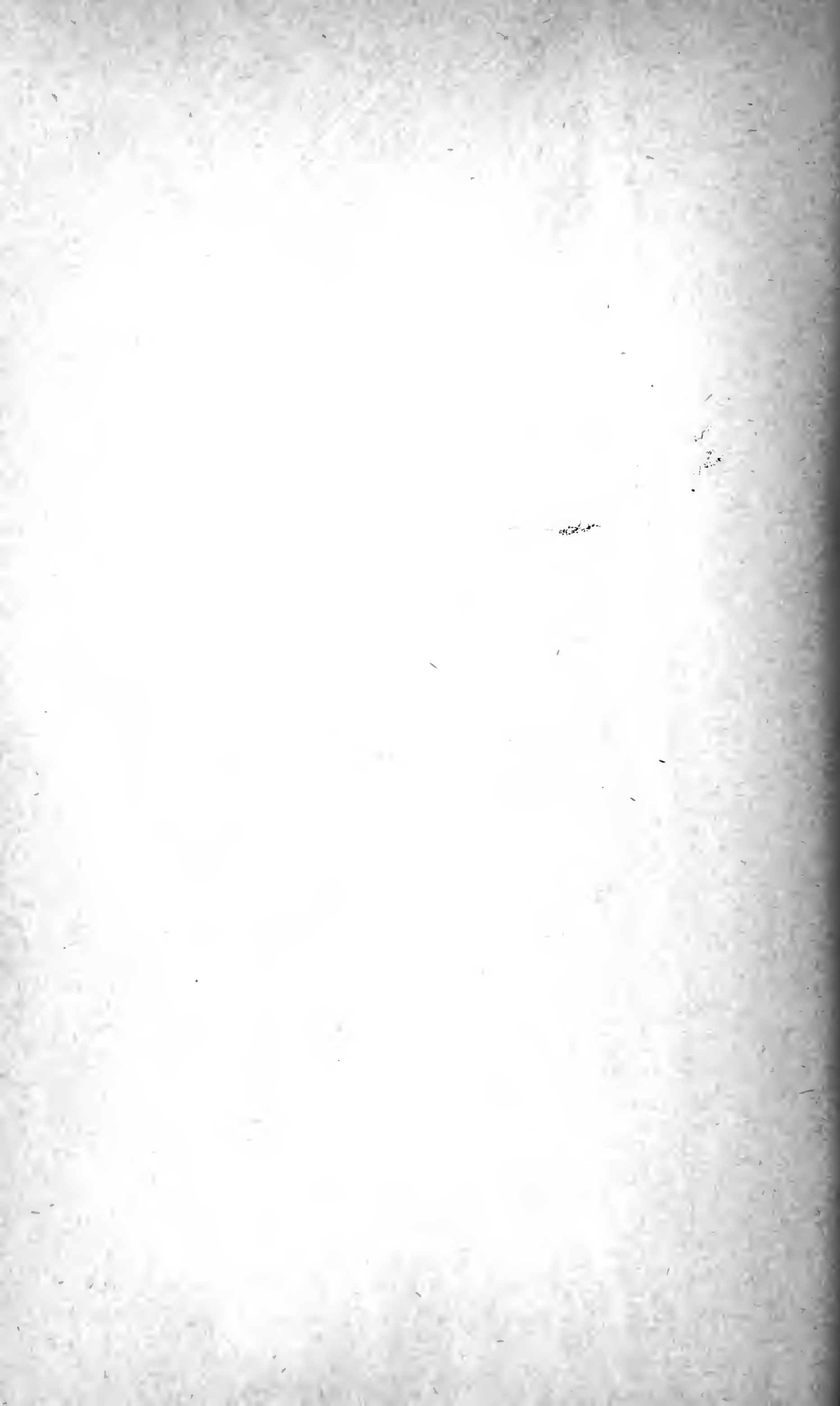

No. 10551

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

17

J. B. Clover,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

In rendering its decision in this case this Honorable Court has clearly and frankly stated (1) that it feels bound, particularly under the *Dobson* case, by the Findings of Fact made by the Board, and (2) that such findings, in its opinion, support the judgment.

With the first proposition we have no quarrel, provided it be understood that by "findings" is meant only those findings that are contained in the Findings of Fact and not mere recitals contained in the opinion. To the second proposition we take exception and believe on the basis of that exception together with other grounds offered below, that we are entitled to a rehearing. We offer the following grounds as a basis for this petition:

First: Facts found in the Findings of Fact alone do not support the judgment. Resort has been taken to statements recited in the *opinion* to sustain the judgment.

Second: The Findings of Fact made by the Court below contradict each other and contradict what both parties to the action agree are the facts. They are both inadequate and defective.

Third: If the right of appeal be regarded as a separate property, as the Tax Court has done, then the dissenting opinion is correct in stating that the right of appeal arose out of the land and when disposed of for cash constituted payment for the land.

Fourth: Taxpayer made disposition of his water rights for the first time when he assigned his judgment and dismissed his appeal and those acts constituted the disposition of his property.

I.

Facts Found in the Findings of Fact Alone Do Not Support the Judgment. Resort Has Been Taken to Statements Recited in the Opinion to Sustain the Judgment.

Viewing the Findings of Fact in the light most favorable to the Government, they go only to the extent of finding "On the same date and in form as a separate transaction taxpayer received from Nev-Cal $41,000 'as consideration for the dismissal of appeal and waiver of right to appeal by him.' "

In its legal opinion the Tax Court goes much further. It makes additional statements—statements not legal in character, nor mere reasoning based upon its Findings of

Fact, but clearly and plainly statements of additional alleged facts. Examination will disclose that the judgment of the Court below, as well as of this Honorable Court, was based upon these additional statements recited in the opinion and could not have been arrived at on the basis of the findings made in the Findings of Fact alone.

Let us consider whether the Findings of Fact proper support the judgment. The extent of the findings has been stated above. The question is: Must a bare dismissal of appeal for a consideration be regarded as resulting in ordinary income? Dismissal of appeal or dismissal of suit is a very common method employed to effect settlement of litigation over property rights and this is so in cases where the payment made is without question intended and accepted by the parties as compensation for the property rights themselves. Such practice is a matter of common knowledge to both courts and attorneys. But the Tax Court says (not in its Findings of Fact but in its legal opinion): "It (the $41,000) was received as consideration for the taxpayer's forbearance to exercise his legal right of appeal, hence was not capital gain but ordinary income." Taken by itself, or based upon the findings proper, we challenge the soundness of any such conclusion. Significantly, the Court cites no cases and offers no authorities to support that proposition. Forbearance to exercise a legal right where settlement has been effected means nothing except as related to the subject matter of the action and the intention of the parties. One or two common examples will serve: A person, through reckless driving of his automobile or airplane, demolishes my building. I threaten to bring suit. The driver offers to pay me what both of us regard as the

reasonable value of the building in consideration of my agreement not to bring suit. I accept. I have foregone my legal rights to sue but plainly what I receive is compensation for my buildings and not ordinary income. There is no technicality or mystery involved in this. It follows the usual rule of being determined by the intention of the parties. Again, suppose I have a dispute with a neighbor over land, I bring suit and he recovers judgment below. I appeal. After the period for taking the appeal has expired and on the eve of hearing, he offers a sum which we both regard as satisfactory compensation for my disputed rights in the land in consideration of my agreement to dismiss the appeal. I accept the offer and dismiss the appeal. Again I have foregone my legal rights in the Court but can there be any question that the money received was received for my rights in the land? Certainly as much so as if the asset itself had been sold. It plainly does not follow as a general proposition that forbearance to exercise a legal right results in ordinary income. Forbearance to exercise a legal right means nothing except as it be related to the subject matter and the intention of the parties. In fact, much more often than not money received in settlement of litigation is received for the property rights involved. It would be only in a case with extraordinary circumstances and unusual attendant facts that a substantial amount would be received for foregoing an empty legal right and not be intended as compensation for the property right relinquished or destroyed. Now the Findings of Fact proper recite only the bare dismissal of the appeal for a consideration. It is on that finding alone that the judgment must stand or fall. It is only in the opinion that there is any hint that it

was paid to avoid delay. It is only in the opinion that any unusual circumstances are found that might be held to take the case out of the ordinary category and characterize the payment as other than for land. The Tax Court obviously felt the need of such additional facts. This Honorable Court also felt the need for such additional facts taken from the opinion for it recites them at length. (Paragraph 5 of the Opinion.) The Court below makes no findings as to the intention of the parties. It does not find that the appeal was frivolous or brought for nuisance value. It does not find that the sum was paid merely to avoid delay. It finds at the most that the petitioner dismissed his appeal for $41,000 paid by Nev-Cal. The mere fact that Nev-Cal paid the money cannot be regarded as a controlling circumstance for two reasons, first, Nev-Cal was in privity with the city. Second, it is immaterial from whom payment was received or the reason that prompted it so long as the taxpayer accepted it as payment for his water rights.

There is "a clear-cut mistake of law" if the Findings of Fact are inadequate to support the judgment. To hold otherwise would mean to say that a conclusion without findings of fact should be sustained because not in conflict with any findings made. Even in the *Dobson* case the Supreme Court said that the judgment must have "warrant in the record." One of the assignments of error relied upon by this petitioner was that the Findings of Fact do not support the Judgment. Since the unusual facts, found in the opinion only, are necessary even under the Court's theory to characterize the payment as ordinary income, the judgment should be reversed.

II.

The Findings of Fact Made by the Court Below Contradict Each Other and Contradict What Both Parties to the Action Agree are the Facts. They Are Both Inadequate and Defective.

What we have to say here, although set apart, might well be added to what has been stated under Heading No. I above. The majority opinion of this Honorable Court states that "The Court on the evidence before it found that these forms accurately reflect the real substance of the arrangement." We do not find any such statement in the Findings of Fact made by the Court below. The Findings of Fact merely recite that the parties did certain things and then incorporate in quotations portions of the forms employed in explaining the consideration for such act. It is, therefore, not entirely clear whether the Court below meant to find that the parties actually did certain acts for certain consideration or that the parties did certain acts for which they employed certain forms which are quoted. But, assuming that the Board did intend to find that the forms used by the parties represented the substance of the transaction, let us analyze those forms to ascertain whether they clearly reflect what was done. The first finding is that, "On May 28, 1933, *while the appeal was pending* the taxpayer '*sold* and *assigned* all his right, title and interest in the $20,000 award' to Nev-Cal Company, *stipulating and agreeing that the assignee might prosecute any appeal* or other proceeding in its own name." Now certainly this was a clear disposition of the right of appeal by this appellant. He not only assigned his right, title and interest in the award below, which was sufficient to constitute the assignee the real party in interest,

but expressly stipulated that the assignee should have the rights in the appeal. This assignment was made "for and in consideration of the sum of $20,000 to him in hand paid by Nev-Cal."

The next finding is clearly conflicting and is in words as follows: "On the same date and in form as a separate transaction, taxpayer received from Nev-Cal $41,000 'as consideration for the dismissal of appeal and waiver of right to appeal' by him." (Quere: What right did taxpayer have to dismiss after having sold and assigned his right to appeal?)

The next finding made is in words as follows:

> "The taxpayer filed a dismissal of the appeal and also a release and discharge of the city from all liability growing out of the condemnation of his interest 'for and in consideration of the payment into Court of $20,000 in satisfaction of judgment,' together with certain costs 'and in consideration of the payment to (him) of an additional sum of $12,000 by the city."

In those findings we have three separate statements of consideration received by the taxpayer for the disposition of his rights in his appeal, all different in language and amount. Moreover, the total recited in the findings does not agree with the total both parties to this action agree petitioner received. Further, the findings are in conflict as to who paid the money, and nowhere is there a finding that the petitioner received $20,000 for his littoral rights separate from his appeal.

The trouble is that the Court below tried to follow the forms filed by the parties and as so often happens the forms are conflicting, with the result that the findings are

also conflicting and confused, inadequate, and even out of line with what both parties agree are the facts. In the following forms the Court failed to find the substance. The case of *Gray v. Powell,* 314 U. S. 402, cited by the Tax Court in support of its following forms, has no true application to the instant case. In *Gray v. Powell* a corporation had chosen to operate through several subsidiaries. When it afterward appeared disadvantageous to have done so it asked that such subsidiaries be disregarded. Hence the Court's statement that parties cannot put aside a deliberately chosen arrangement.

If the taxpayer's case on appeal is to be concluded solely on the Findings of Fact made by the Tax Court, then certainly the law, including the *Dobson* case, intends that such findings shall be clear and complete in support of the judgment. Particularly does the taxpayer have a right to expect such clear and unequivocal findings where the whole case turns upon a supposed or alleged finding of fact made by the Court below and the Circuit Court feels itself bound by such finding. That is truly the situation in the instant case and the majority opinion so states. Consider also that in the instant case the lower Court has arrived at a conclusion which is not in line with ordinary thinking and for that very reason should have stated with even more particularity than usual the peculiar facts on which such conclusion is based. Again, the cardinal principle in tax cases that substance shall prevail over form impresses upon the Tax Court in the instant case a special duty to support its judgment with clear and unequivocal findings. Again, and perhaps most important

of all, consider that the 90-day letter of the Commissioner characterizes the entire $61,000 as "capital net gain." [See Tr. p. 11.] In view of the statutory presumption of correctness which such letter enjoys in the Tax Court, was it not incumbent on the Tax Court to find its distinguishing facts with particularity? All this the Court below has failed to do. Its findings are both inadequate and defective.

III.

If the Right of Appeal be Regarded as a Separate Property, as the Tax Court Has Done, Then the Dissenting Opinion Is Correct in Stating That the Right of Appeal Arose Out of the Land and When Disposed of for Cash Constituted Payment for the Land.

The taxpayer acquired certain littoral rights in 1918. In 1934 as a result of condemnation proceedings these littoral rights were taken away from him. Such a proceeding constitutes a sale or exchange under the Revenue Acts. *Hawaiian Gas Products, Ltd. v. Commissioner,* 126 F. (2d) 4. In exchange for such littoral rights he received two things: First, an award of $20,000; Second, a right of appeal. The right of appeal was received in exchange for the littoral rights—as much so as the award itself. As was said in the dissenting opinion, it cannot be treated "as if it came out of thin air." Without such littoral rights and without their being taken from him, how could the petitioner have become vested with such right of appeal? The right of appeal was a direct and proximate result of his investment in littoral rights and the taking

from him of such littoral rights. The right of appeal had only a speculative value when received. It could not be said to have a determinable fair market value when received. It, therefore, comes within that group of cases holding that where property is exchanged for other property and the latter does not have a fair market value then the taxable incident is deferred until the latter property is converted into money or other property having a measurable market value and when so converted the cash or other property received constitutes payment for the original asset and is applied against the cost basis of the original asset.

Below is a partial list of the decided cases wherein it has been held that the notes, contract, or other property received in exchange had no determinable fair market value when received and would become income only when converted into cash or other property in an amount in excess of the cost of the original asset.

Cambria Development Co., 34 B. T. A. 1155;
Ravlin Corporation, 19 B. T. A. 1112;
Miami Beach Improvement Co., 14 B. T. A. 10;
Stevenson, 9 B. T. A. 552;
Joilet Norfolk Farm Corporation, 8 B. T. A. 824;
Titus, Inc., 33 B. T. A. 928;
Old Farmers Oil Co., 12 B. T. A. 203;
Woodman Realty Co., 17 B. T. A. 886;
Burnet v. Logan, 283 U. S. 404;
E. F. Simms, 28 B. T. A. 988;
Rocky Mt. Development Co., 38 B. T. A. 1303;

Hunt Production Co., 38 B. T. A. 457;

Kimball, et al., 41 B. T. A. 940;

Commissioner v. Edwards Drilling Co., 95 F. (2d) 719 (C. C. A. 5);

Dearing, et al., 36 B. T. A. 843.

The leading case in this group of cases is the decision by the Supreme Court in *Burnet v. Logan, et al.*, 283 U. S. 404. The case is authority for the proposition that where a property is exchanged for other property and the latter does not have an ascertainable or market value, then the taxpayer does not realize income until the latter property is converted into cash or other property having a determinable market value, and no income is realized until the cost of the original property given in exchange has been recovered.

Under the holdings in the above decision it is immaterial whether the taxpayer files his return on a cash or an accrual basis. The asset without determinable fair market value is income to neither until converted into something having measurable market value. See:

Titus, Inc., 33 B. T. A. 928.

The judgment in the instant case providing payment of a certain amount for the condemned rights is like the contracts discussed in the foregoing cases, which contracts also provide for payments of certain amounts for the property taken or sold. The pending appeal, since it operated solely on the judgment, was also like the contracts dealt with in the above cited cases. Some of those contracts were evidenced by notes, others were not; some were secured and others unsecured. All represent the payment

the owner is to receive for his property. Like the contracts discussed, the judgment which had not become final and the appeal pending therefrom did not have determinable market value. When finally liquidated they constituted payment for the property taken and to the extent they exceeded the cost represented gain. Since the property taken was admittedly a capital asset the gain realized was wholly capital gain. Since the asset taken was admittedly acquired in 1918 only 30% of such gain was subject to tax.

IV.

Taxpayer Made Disposition of His Water Rights for the First Time When He Assigned His Judgment and Dismissed His Appeal and Those Acts Constituted the Disposition of His Property.

I wish to renew the argument advanced in the Appellant's Opening Brief. I offer the following in support of that argument because it presents what is perhaps a fresh viewpoint.

The taxpayer did not lose his water rights in 1934 when the judgment was entered. So long as judgment was not final the taxpayer remained the owner of his water rights, subject, however, to the judgment of condemnation already entered and his pending appeal therefrom. The water rights, the judgment entered, and the pending appeal were all part and parcel of the same property. The judgment and pending appeal during the period 1934 to May, 1935, constituted a lien on his property, a restriction, limitation, and encumbrance to his title. They were not separate and distinct properties but rather legal incidents in the same property. When the petitioner as-

signed the judgment and dismissed his appeal he made disposition for the first time of this property, that is, of his water rights with all the incidents thereto. The assignment and dismissal constituted his disposition of his water rights without awaiting final court action. Nothing further was required to sever his ownership but severance did not occur until that time. Dismissal of the appeal was nothing more than the disposition of one of the incidents in the property itself—a step taken in disposing of the water rights themselves.

Procedural laws of the land are as much a part of the bundle of rights that comprise property as are substantive laws of the land. This is so, otherwise a property owner would have no means of enforcing his substantive rights to protect his property. The Constitutional guaranty that property shall not be taken without due process of law is one of the rights acquired with property. The laws of the land are a part of his contract. The right to trial if a city should ever seek to condemn the lands of this petitioner, and the right to appeal if he were aggrieved by such trial were rights that this petitioner acquired in 1918, when he acquired his lands. They are incidents of ownership.

Respectfully submitted,

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